

107  
3289  
Sup C  
**CLERK'S COPY.**

**TRANSCRIPT OF RECORD**

---

---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1923**

**No. 300**

---

**WESTERN UNION TELEGRAPH COMPANY, PETITIONER,**

**vs.**

**J. A. CZIZEK**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

---

---

**PETITION FOR CERTIORARI FILED APRIL 19, 1923**

**CERTIORARI AND RETURN FILED JULY 30, 1923**

**(29,562)**



(29,562)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 300

WESTERN UNION TELEGRAPH COMPANY, PETITIONER,

*vs.*

J. A. CZIZEK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Record from district court of Ada County.....	7
Complaint .....	7
Record from U. S. district court for the district of Idaho.....	14
Answer .....	14
Exhibit A to Answer—Telegram, T. J. Jones to J. A. Czizek, November 30, 1917.....	31
Decision, Dietrich, J.....	37
Special findings of fact and conclusions of law.....	41
Judgment .....	52
Bill of exceptions.....	53
Stipulation waiving jury trial, etc.....	54
Testimony of T. J. Jones.....	55
Plaintiff's Exhibit No. 2—Letter, G. H. Hackett to T. J. Jones, February 14, 1918.....	68
Plaintiff's Exhibit No. 3—Letter, T. J. Jones to G. H. Hackett, February 18, 1918.....	69
Testimony of J. A. Czizek.....	74
Plaintiff's Exhibit No. 4—Letter, J. A. Czizek to Western Union Telegraph Co., June 18, 1918.....	83

Plaintiff's Exhibit No. 6—Letter, Western Union Telegraph Co. to J. A. Czizek, July 2, 1918.....	86
Plaintiff's Exhibit No. 7—Letter, G. H. Hackett to J. A. Czizek, June 19, 1918.....	87
Testimony of Felix T. Jones.....	88
J. A. Czizek (recalled).....	94
H. L. Streeter.....	97
Nellie M. Wilson.....	100
L. C. Flora.....	101
Notation as to Defendant's Exhibit B.....	104
Defendant's Exhibit C—Extract from rules of I. C. C. re telegraph messages.....	106
Testimony of L. C. Flora (recalled).....	109
Defendant's Exhibit A—Stipulation as to testimony of G. H. Hackett .....	112
Defendant's Exhibit B—Stipulation as to testimony of Mrs. Margaret Holland.....	123
Request for declarations of law.....	124
Order settling bill of exceptions.....	124
Petition for and order allowing writ of error.....	126
Assignment of errors.....	130
Bond on writ of error.....	132
Writ of error.....	134
Citation and service.....	136
Præcipe for transcript of record.....	137
Clerk's certificate.....	139
Proceedings in C. C. A.....	141
Order of submission.....	142
Order filing opinion and decree.....	143
Opinion, Wolverton, J.....	150
Judgment .....	151
Stipulation and order staying mandate.....	152
Opinion of U. S. district court, April 28, 1920.....	161
Opinion of C. C. A., Hunt, J., April 4, 1921.....	173
Clerk's certificate.....	175
Writ of certiorari and return.....	175

*In the District Court of the Third Judicial District  
of the State of Idaho, in and for the County of Ada.*

---

J. A. CZIZEK,

*Plaintiff,*

vs.

THE WESTERN UNION TELEGRAPH  
COMPANY, a Corporation,

*Defendant.*

---

### COMPLAINT.

The above named plaintiff complaining of the  
above named defendant, avers:

#### I.

That the defendant is, and at the several times  
hereinafter mentioned was, a corporation duly or-  
ganized under and by virtue of the Laws of the State  
of New York, and is now, and was at all such times,  
engaged in the business of a common carrier of mes-  
sages by telegraph, for hire, and owned and operated  
wire connections between the cities of Boise, Idaho,  
and Oakland, California, and was engaged in trans-  
mitting telegraph messages for hire between said  
Cities.

## II.

That on the 30th. day of November 1917, and for some time prior thereto, and ever since, said date, plaintiff was and is the owner of fifty shares of the capital stock of the Idaho National Bank, a corporation organized under the National banking laws of the United States, with its principal place of business at Boise, Idaho, which said shares of stock were of the par value of \$100.00 per share.

## III.

That during the latter part of October, 1917, plaintiff, while at Boise, Idaho, received information that one David Miller might desire at some future time, to purchase as much of the outstanding stock in said Idaho National Bank as he could obtain, for the purpose of effecting a consolidation of said bank with the Pacific National Bank of Boise, Idaho. That the plaintiff desired to sell his fifty shares of stock and was then about to leave Boise for his home in Oakland, California. That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National Bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock.

IV.

That a short time thereafter and early in the month of November, 1917, plain went from Boise to his home at 5767 Shafter Avenue, Oakland, California, where he remained from early in November, 1917, until his return to Boise about the middle of February, 1918.

V.

That on the 30th day of November, 1917, said T. J. Jones acting under the arrangement with plaintiff, set forth in paragraph III. hereof, presented to the defendant, at its Office in Boise Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks, supplied by defendant for that purpose, which message was in words and figures, as follows, to-wit:

"November 30, 1917.

J. A. CZIZEK,  
5767 Shafter Avenue,  
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

T. J. Jones."

That said defendant received and accepted said message and became thereby obligated to forward the same by telegraph to plaintiff in Oakland, California, and in consideration thereof, said T. J. Jones, paid to the defendant the regular toll or

charge for transmitting said message amounting to sixty-five cents.

#### VI.

That on account of the gross negligence of the defendant said message was never transmitted by defendant to plaintiff, and was consequently never received by plaintiff.

#### VII.

That said T. J. Jones, by reason of his not receiving a reply from plaintiff to said message, made several inquiries of defendant at its office in Boise, Idaho, between said 30th. day of November, and the 4th. day of December, 1917, as to whether said message had been sent to plaintiff, and was informed by defendant that said message had been sent by defendant to plaintiff and had been delivered to plaintiff on December 1, 1917.

#### VIII.

That said T. J. Jones relied upon and believed said statements of defendant that it had sent said message and delivered it to plaintiff on December 1, 1917, and concluded that plaintiff was on his way to Boise.

That said David Miller then had the money with him at Boise, Idaho, for the purchase of said bank stock of plaintiff and said T. J. Jones, and on or about the 4th. day of December, 1917, said T. J. Jones sold his said bank stock to said David Miller for the sum of ninety dollars per share. That said

David Miller was then ready and willing to buy plaintiff's fifty shares of said stock and to pay therefor the sum of Forty-five hundred dollars, and plaintiff was ready and willing to sell the same for that amount, and except for the gross negligence of defendant in failing to transmit said message to plaintiff, the plaintiff would have then sold his said fifty shares of stock to said David Miller, and would have received therefor the sum of \$4,500.00.

IX.

That plaintiff was not informed that said message had been delivered to defendant to be sent to him, until his return to Boise, Idaho, from Oakland, California, about the middle of February, 1918, and immediately upon learning such fact, plaintiff accompanied by said T. J. Jones, called at the defendant's Office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, and the original message which was delivered, by said T. J. Jones to defendant, on November 30, 1917, was then delivered by defendant to plaintiff.

X.

That on or about the 15th. day of February, 1918, said T. J. Jones, received from defendant a letter, in words and figures as follows, to-wit:

**"THE WESTERN UNION TELEGRAPH  
COMPANY.**

**(Incorporated)  
Manager's Office.**

Boise, Ida., Feb. 14, 1918.

T. J. Jones, Atty at Law,  
Boise, Idaho.

Dear Sir:

I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Cizek, Oakland., failed in transmission.

The employees concerned in the failure will be vigorously disciplined.

I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted and, in accordance with out custom in such cases, I enclose herewith the amount paid as tolls.

Yours truly,

G. H. Hackett.

Manager."

That said letter contained a check for said sixty-five cents tolls paid by said T. J. Jones for transmitting said message, which said check was not accepted by said Jones or by plaintiff, but was returned by them to defendant.

## XI.

That ever since the time plaintiff first learned that said message had been delivered to defendant, to be sent to him, to-wit: about the middle of February, 1918, his said bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank and its assets are being applied to the payment of its outstanding debts.

That plaintiff is informed and believes, and therefore alleges upon information and belief, that the

assets of said bank will not be greater than the said indebtedness, and that nothing will be available for the stockholders of said bank when such liquidation is closed.

XII.

That by reason of the failure of defendant to transmit said message to him, plaintiff wholly lost the opportunity to sell his said bank stock, and has been unable at any time since to sell the same and said bank stock is still held by plaintiff and is without value, and by reason of such failure plaintiff has sustained damages in the sum of \$4500.00.

XIII.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Forty-five hundred Dollars, with interest thereon from December 1, 1917, at seven per cent per annum, until judgment, and for interest on said judgment, and for his costs and disbursements incurred herein.

RICHARD H. JOHNSON,  
*Attorney for Plaintiff,*  
Residence, Boise Idaho.

(Duly Verified.)

Endorsed:

Filed in U. S. Court July 30, 1919.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

J. A. CZIZEK,

*Plaintiff,*

vs.

WESTERN UNION TELEGRAPH  
COMPANY, a corporation,

*Defendant.*

At Law. No. 692.

---

ANSWER.

---

Comes now the above named defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

FIRST FOR A FIRST DEFENSE.

I.

Admits that this defendant is and at the times mentioned in the complaint was a corporation, duly organized under and by virtue of the laws of the State of New York, and is now and was at all such times engaged in the business of transmitting messages by telegraph for hire, and owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was at all times mentioned in the complaint and now is engaged in transmitting telegraphic messages for hire between said cities; but denies that this defendant is now or at any of the times mentioned in the complaint was a common carrier of such messages.

## II.

As to the allegations of paragraph II of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that on the 30th day of November, 1917, or for sometime prior thereto, or ever since said date or at any time or at all, plaintiff was or is the owner of fifty or any shares of the capital stock of the Idaho National Bank, a corporation organized under the National Banking Laws of the United States, with its principal place of business at Boise, Idaho, which said shares, or any shares, of stock were of the par value of \$100.00 per share, or any other sum.

## III.

As to the allegations of paragraph III of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that during the latter part of October, 1917, or at any time or at all, plaintiff while at Boise, Idaho, or any other place, received information that one David Miller might desire at some future time, or any time, to purchase as much or any of the outstanding stock in said Idaho National Bank as he could obtain for the purpose of effecting a consolidation of said Bank with the Pacific National Bank of Boise, Idaho, or for any purpose, or that the plaintiff desired to sell his said fifty or any shares of stock or was then or at any other time about to leave Boise for his home

in Oakland, California, or any other place, or that prior to plaintiff's departure for California or any other place, or early in the month of November, 1917, or at any time or at all, plaintiff had an oral understanding, or any understanding, with one T. J. Jones, who resides at Boise, Idaho, or who was also an owner of stock in said Idaho National Bank, or who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their stock jointly, or that such understanding was that said Jones should notify plaintiff at his home in Oakland, California, or any other place, whenever said Miller was ready to purchase their said stock, or any stock.

#### IV.

As to the allegations of paragraph IV, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that a short time thereafter or early in the month of November, 1917, or at any other time or at all, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, or any other place, or that he remained there from early in November, 1917, or any other time, or until his return to Boise about the middle of February, 1918, or at any other time.

#### V.

Admits that on or about the 30th day of November, 1917, said T. J. Jones presented to the defend-

ant at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks supplied by defendant for that purpose, which message was in words and figures as set forth in paragraph V of said complaint; and defendant alleges that a true and correct copy of said message, together with the provisions and statements on the telegraph blank upon which it was written is attached to this answer, marked Exhibit "A", and hereby referred to and made a part of this answer for the purpose of setting forth more fully the said message and the terms and conditions under which it was delivered to defendant and received by it. Admits that defendant received and accepted said message, but denies that defendant became thereby or otherwise obligated to forward the same by telegraph to plaintiff in Oakland, California, or elsewhere, except in accordance with the terms, conditions, rules and regulations printed upon said telegraph blank, as more fully shown by said Exhibit "A" hereto attached, and in this answer hereinafter alleged. Admits that said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents (65c).

## VI.

Denies that on account of the gross negligence, or any negligence, of the defendant said message was never transmitted by defendant to plaintiff, or was consequently or otherwise never received by plaintiff.

## VII.

Denies that said T. J. Jones by reason of his not receiving a reply from plaintiff to said message, or for any reason, made several or any inquiries of defendant at its office in Boise, Idaho, or elsewhere, between said 30th day of November and the 4th day of December, 1917, or at any time or at all, as to whether said message had been sent to plaintiff or in regard to said message in any way or at all, and denies that said T. J. Jones was informed by defendant that said or any message had been sent by defendant to plaintiff or had been delivered to plaintiff on December 1st, 1917, or at any time or at all.

## VIII.

As to the allegations of paragraph VIII of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that said T. J. Jones relied upon or believed said or any statements of defendant that it had sent said or any message or delivered it to plaintiff on December 1st, 1917, or that said Jones concluded that plaintiff was on his way to Boise; denies that defendant ever made any statements that it had sent or delivered said message, as aforesaid, or otherwise. Denies that said David Miller then had the or any money with him at Boise, Idaho, for the purchase of said Bank stock, or any bank stock or other stock, of plaintiff or said T. J. Jones, or that on or about the 4th day of December, 1917, or at any time or at all said T. J.

Jones sold his said bank stock, or any bank stock, to said David Miller for the sum of \$90.00 per share, or for any sum, or that said David Miller was then ready or willing to buy plaintiff's fifty shares of said stock or any number of shares, or to pay therefor the sum of \$4,500.00, or any other sum, or that plaintiff was ready or willing to sell the same for that amount or any amount, or that except for the gross or any negligence of defendant in failing to transmit said message, or any message, to plaintiff the plaintiff would have then sold his said or any fifty shares of stock to said David Miller or would have received therefor the sum of \$4,500.00, or any other sum.

### IX.

As to the allegation that plaintiff was not informed that said message had been delivered to defendant to be sent to him until his return to Boise, Idaho, from Oakland, California, or elsewhere, about the middle of February, 1918, or at any other time, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies such allegations and each and every part thereof. Admits that about the middle of February, 1918, plaintiff accompanied by said T. J. Jones called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, but denies that the original message which was delivered by said T. J. Jones to defendant on November 30, 1917, or at any

other time, was then delivered by defendant to plaintiff, or that plaintiff and said Jones, or plaintiff or said Jones, called at defendant's office immediately upon plaintiff's learning that said telegram had been delivered to defendant to be sent to him.

### X.

Admits that on or about the 15th day of February, 1918, said T. J. Jones received from defendant that certain letter in words and figures as set out in paragraph X of the complaint herein, and that said letter contained a check for said 65c tolls paid by said T. J. Jones for transmitting said message, and that said check was not accepted by said Jones or by plaintiff but was returned by them to defendant.

### XI.

As to the allegations of paragraph XI, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground defendant denies that ever since the time plaintiff first learned that said message had been delivered to defendant to be sent to him, to-wit, about the middle of February, 1918, or at any time or at all, plaintiff's said or any bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank, and its assets are being applied to the payment of its outstanding debts, or for any other reason or at all, or that the assets, or any assets, of said Bank will not be greater

in value than the said or any indebtedness, or that nothing will be available for the stockholders of said bank when such liquidation is closed, or at any time, or at all.

## XII.

Denies that by reason of the failure of defendant to transmit said or any message to him, plaintiff wholly or otherwise lost the opportunity to sell his said or any bank stock, or has been unable at any time since to sell the same, or that said Bank stock is still held by plaintiff or is without value, or that by reason of such failure plaintiff has sustained damages in the sum of \$4,500.00, or any other sum.

### SECOND FOR A SECOND SEPARATE AND FURTHER DEFENSE.

#### I.

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all the times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce, and that the message alleged to have been delivered by said T. J. Jones to defendant was an interstate message to be sent from a point in the State of Idaho to a point in the State of California, and was as such interstate commerce, and that said message was delivered to and accepted by the defendant subject to the terms

of a certain contract in writing, a copy of which is attached to this answer, marked Exhibit "A", made a part hereof and hereby referred to for a more full and complete statement of the terms of said contract.

## II.

That as more fully appears from said Exhibit "A", attached hereto, it was a term and condition of the said contract subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for damages or statutory penalties in any case where the claim therefor was not presented in writing within sixty days after the telegram was filed with the Company for transmission, and that no claim in writing was presented to defendant within sixty days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918, when plaintiff addressed a letter to defendant's Manager at Boise, Idaho, demanding payment of the sum of \$4,500.00, with interest from and after the 9th day of December, 1917.

## III.

That by the Act of Congress approved June 18, 1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State reg-

ulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

#### IV.

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

#### V.

That the said stipulation in the contract subject to which said message was accepted, to the effect that claim in writing for any damage should be made within sixty days after the message was filed for transmission, was reasonable and valid

and binding upon plaintiff herein, and free from any regulation or control on the part of the State of Idaho.

### THIRD FOR A THIRD SEPARATE AND FURTHER DEFENSE.

#### I.

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all the times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce.

#### II.

That the message referred to in the complaint was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is hereto annexed, marked Exhibit "A", hereby referred to, and made a part of this answer.

#### III.

That as more fully appears from Exhibit "A" hereto annexed it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or fore non-delivery of any unrepeatd message be-

yond the amount received for sending the same; and that the said message was an unrepeatd message and defendant was not directed or requested to repeat the same, and all that the defendant received in exchange for its obligation in respect to said message was the sum of 65c, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

#### IV.

That such message was an interstate message, to be sent from a point in the State of Idaho to a point in the State of California, and was, as such, interstate commerce.

#### V.

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into "repeated" and "unrepeated"; a repeated message, as the name implies, being a message which the defendant agrees that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the case of unrepeated messages defendant assumes no liability (except for gross negligence) beyond the amount received for sending the

same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract;) and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant, at all the times mentioned, made and still makes an additional charge equal to one-half of the un-repeated message rate.

## VI.

That by the Act of Congress approved June 18, 1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Inter-

state Commerce Commission has ever since retained and still retains.

## VII.

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which, and of all the premises, the defendant says that the stipulation in the contract, subject to which this message, if any, was accepted, to the effect that the defendant's liability should not, in any event, exceed the sum of sixty-five cents, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Idaho or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of sixty-five cents, with interest from the first day of December, 1917.

#### FOURTH FOR A FOURTH SEPARATE AND FURTHER DEFENSE.

##### I.

Defendants repeats all the allegations of the third and separate and further defense herein.

##### II.

Alleges that as more fully appears by Exhibit "A", hereto annexed, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

##### III.

That such message was an interstate message, to be sent from a point in the State of Idaho to a point in the State of California, and was, as such, interstate commerce.

##### IV.

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into messages valued by the senders

thereof at fifty dollar, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and tariffs for the transmission and delivery of messages are based on the assumption that the message is valued at fifty dollars or less, and that in the case of a message valued at a specified sum in excess of fifty dollars, it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

## V.

That by the Act of Congress, approved June 18, 1910, (36 Stat. L. 539), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies, engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Inter-

state Commerce Commission has ever since retained and still retains.

## VI.

That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all the premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 1st day of December, 1917.

WHEREFORE, having fully answered the complaint of plaintiff herein, defendant prays that plaintiff take nothing by his said action, that defendant be dismissed hence without day, and that defendant have judgment for its costs and disbursements in this action, most unjustly expended.

RICHARDS & HAGA,  
*Attorneys for Defendant.*  
Residence: Boise, Idaho.

(Duly Verified)

EXHIBIT A.

Class of Service WESTERN UNION Form 1206  
Desired

Western Union Receiver's No.  
TELEGRAM M. B. 60

Day Letter

Night Message

Night Letter x

Check

49 pdnl

Time Filed.

Patrons should mark an x  
opposite the class of  
service desired; OTHERWISE

THE TELEGRAM WILL BE TRANS-  
MITTED AS A FAST DAY MESSAGE.

Newcomb Carlton, President

George W. E. Atkins, First  
Vice-President

Send the following telegram,  
subject to the terms on back  
hereof, which are hereby  
agreed to

BOISE, IDAHO

November 30, 1917.

J. A. Czizek,  
5767 Shafter Avenue,  
Oakland, Calif.

Miller advises Idaho National sold to Pacific of-  
fers me ninety dollars per share otherwise wait  
(year) and chances of liquidation says if fails to  
get two thirds stock liquidation will follow. Will

you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.

(454 Yates B)

(.65c) (408-W)

ALL TELEGRAMS TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of **FIFTY DOLLARS**, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's mes-

sengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

## THE WESTERN UNION TELEGRAPH COMPANY

Incorporated

Newcomb Carlton, President.

### CLASSES OF SERVICE.

#### **FAST DAY MESSAGES**

A full-rate expedited service.

#### **NIGHT MESSAGES**

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

#### **DAY LETTERS**

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for

the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

### SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Day letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission

and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

*No employee of the Company is authorized to vary the foregoing.*

### **NIGHT LETTERS**

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

### **SPECIAL TERMS APPLYING TO NIGHT LETTERS:**

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

*No employee of the Company is authorized to vary the foregoing.*

Service of the above and foregoing Answer and receipt of a copy thereof is hereby acknowledged this 22d day of December, 1919.

RICHARD H. JOHNSON,  
*Attorney for Plaintiff.*

Endorsed: Filed Dec. 22d, 1919,  
W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

DECISION

---

February 21, 1922.

R. H. JOHNSON,  
*Attorney for Plaintiff.*

RICHARDS & HAGA and  
McKEEN F. MORROW,  
*Attorneys for Defendant.*

---

DIETRICH, DISTRICT JUDGE:

Upon the general question discussed by counsel, I think it must have been contemplated by the appellate court that there would be a trial *de novo*. The direction is not that a judgment be entered for the plaintiff, or that the findings be made upon the evidence already taken, but for a new trial, without qualification or limitation. At such a trial I

am unable to see how I can properly exclude material evidence merely because it is new.

The additional evidence tends only to explain the failure to transmit the message. The former record was devoid of any showing suggestive of willful or fraudulent conduct, and there being no evidence other than the admitted fact of non-transmission, it was not thought a finding of gross negligence was warranted, even if such finding were to be regarded as material. The appellate court, taking a different view, held the default to be gross negligence; whether on the theory that a failure to send is inherently and necessarily so to be characterized or because the burden was upon the defendant to overcome a rebuttable presumption does not appear. If upon the former theory, the new evidence is, of course, immaterial; if upon the latter, it would seem to be sufficient to purge the defendant of the charge of *gross* negligence, to say the least. It tends to show that the defendant had in force a reasonable system of receiving and checking messages offered for transmission, and had exercised reasonable care in the selection of its employees. According to its office regulations, when the counter clerk received this message she should have put upon it certain notations, and then placed it upon the sending hook for transmission. Upon investigation immediately after the default was brought to his notice, the local manager found the message, not in the files of the day it was received,

but in the files of the preceding day, bearing the initials of, and certain notations made by, the receiving clerk, but without any perforation from the sending hook. Quite clearly the fault is chargeable to Margaret Brown, the receiving clerk, who was regarded as a competent employe. From all the facts the natural inference is that, having before her the files of the preceding day at the time this message was delivered to her for transmission, she inadvertently placed it with these earlier messages, and filed it away with them, instead of putting it on the sending hook. Unless the failure to transmit is to be deemed gross negligence *per se*, I am unable to find gross negligence.

But be that as it may, another consideration would seem to be controlling. Upon the assumption that a party to a telegram can be injured in one or more of only three ways—error in the delivered message, delay in delivery, or non-delivery, I had supposed that all possible contingencies were expressly covered by the stipulations upon which the defendant relies, and that it is immaterial whether the causative negligence occurred in the sending office, the receiving office, or a relay office. But as I construe the opinion of the appellate court, a different view is there held, and a substantial distinction is to be made between non-delivery attributable to negligence of the sending office and non-delivery due to negligence of employes at the receiving office. Discussing one of the stipulations pleaded by

the defendant, the Court says: "Granting such a restriction is valid and binding where there has been a mistake or delay in transmission or delivery, or where the message has been transmitted but not delivered, whether such errors have been caused by the negligence of the servants of the company or otherwise, we do not construe non-delivery as the full equivalent of non-transmission." Admittedly there was a failure to transmit, and if "non-delivery" as the term is used in the stipulations in question does not cover a non-delivery resulting from non-transmission, then, of course, the stipulations constitute no defense.

It is further urged by defendant that the appellate court does not criticise our former ruling to the effect that there was no sufficient competent evidence to warrant a finding that the plaintiff would have accepted Miller's offer or could have delivered the stock in time to avail himself thereof. It is true there was no comment by the appellate court upon this ruling, but by implication it was held to be erroneous, for if it was right the evidence did not warrant a judgment against the defendant, whatever views may have been entertained touching other features of the case, and upon such an assumption a new trial should not have been ordered. It must, therefore, be concluded that the court felt it was competent for the plaintiff to testify what he would have done if he had received the telegram, and that it should have been found

that he was able to deliver and would have delivered the stock in time to avail himself of the offer. There is now no additional evidence on that point.

There can, of course, be no question about the proper measure of damages, and I think the evidence is sufficient to justify the finding that the stock became worthless soon after the telegram was tendered and has continued so to be.

Accordingly, in deference to what I understand to be the views of the appellate court, judgment will be entered in favor of the plaintiff for \$4,500.00, with interest thereon at the rate of seven per cent from June 18, 1918, and costs.

*Memo.*

I have noted on requests for findings substantially what I shall find. Defendant's counsel may prepare formal findings accordingly.

Endorsed: Filed Feb. 21, 1922,  
W. D. McREYNOLDS, Clerk.  
By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

---

**SPECIAL FINDINGS OF FACT.**

THIS CAUSE come regularly on to be heard on the 18th day of February, 1922, before the Court without the intervention of a jury, (the parties through their attorneys of record having before the

commencement of this trial, filed with the Clerk a stipulation in writing waiving a jury,) Messrs. Johnson & Nixon appearing for plaintiff and Messrs. Richards & Haga appearing for defendant, and the Court having heard the evidence introduced by the respective parties and being fully advised in the premises, makes the following special findings of fact herein, to-wit:

### I.

That defendant at all times mentioned in the complaint was a corporation organized and existing under and by virtue of the laws of the State of New York, and was engaged in the business of a common carrier of messages by telegraph for hire, and was engaged in operating wire connections between Boise, Idaho, and Oakland, California, and other points, and in transmitting telegraph messages for hire between said cities.

### II.

That on November 30, 1917, plaintiff was the owner of fifty shares of the capital stock of the Idaho National Bank, which stock had a par value of \$100.00 per share, and plaintiff still owns said stock.

### III.

That on November 30, 1917, said stock was held by the Security Bank of Oakland, California, as security for a loan.

## IV.

That on Friday evening, November 30, 1917, T. J. Jones, acting as agent for the plaintiff, delivered to defendant at its office in Boise, Idaho, the following telegram, to-wit:

## WESTERN UNION

Class of Service		Form 1206
Desired	Western Union	Receiver's No.
Fast Day Message	TELEGRAM	M. B. 60
Day Letter	.	Check
Night Message		49 pdnl
Night Letter	X	Time filed

Patrons should mark an "X" opposite the class of service desired; OTHER WISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

NEWCOMB CARLTON, President.

GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Nov. 30, 1917.

J. A. CZIZEK,

5767 Shafter Avenue,

Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get

two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES,

(454 Yates B)

(.65c) (408-W)

V.

That the terms of the contract for the transmission of said telegram as shown by the printed stipulations on the back of the blank on which said telegram was written, introduced in evidence as defendant's Exhibit "A", were substantially as follows:

*"All telegrams taken by this company are subject to the following terms:*

*"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeatd telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNDEPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:*

*"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for*

sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

"3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

"4. Telegrams will be delivered free within one-half mile of the Company's offices in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

"5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing

within sixty days after the telegram is filed with the Company for transmission.

*"7. Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

*"8. No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH  
COMPANY,  
Incorporated.

NEWCOMB CARLTON, President."

#### "NIGHT LETTERS

"Accepted up to 2:00 A. M. for delivery on the morning of the ensuing business day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

#### "SPECIAL TERMS APPLYING TO NIGHT LETTERS:

"In further consideration of the reduced rate for the special 'Night Letter' service, the following special terms in addition to those enumerated above are hereby agreed to:

"A. Night Letters may at the option of the Telegraph Company be mailed at destination to the addressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

"B. Night Letters shall be written in plain English. Code language is not permissible.

*"No employee of the Company is authorized to vary the foregoing."*

VI.

That said telegram was delivered to and accepted by defendant, subject to the terms and conditions contained in such contract of transmission as above set forth.

VII.

That said telegram was an unrepeatd message of the class known as night letter and was valued at \$50.00 in accordance with the provisions of the telegraph blank above set forth, but was not specially valued in accordance with paragraphs 1 and 2 of the provisions above set forth, and no additional sum was paid or agreed to be paid for sending said telegram based upon any value in excess of said sum of \$50.00.

VIII.

That said telegram was an interstate message to be sent from Boise, Idaho, to Oakland, California, and as such was interstate commerce.

IX.

That prior to the filing of said telegram with defendant, the Interstate Commerce Commission had full knowledge of the rates, charges and classifications established by defendant as set out on the blank on which such telegrams was written as

hereinbefore stated, and the form of such blank had been regularly filed with said Interstate Commerce Commission, and said Commission had acquiesced in and approved the provisions therein contained and the rates, charges and classifications thereby established, prior to the filing of said telegram with defendant, thus recognizing the right of defendant to charge a higher rate for a greater liability and a lower rate for a lesser liability.

### X.

That on the 30th day of November, 1917, David Miller, the party referred to in said telegram, was ready, able and willing to buy the stock of plaintiff in the Idaho National Bank and continued ready and able to buy said stock until the 5th day of December, 1917.

### XI.

That defendant on November 30, 1917, had in force a reasonable system of receiving and checking messages offered for transmission at its Boise office; that under the system employed by defendant, it was the duty of the receiving clerk to indorse her initials, the filing time and the amount of the toll on each message received, and place it on the sending hook for transmission. It was the duty of the operator transmitting the message to endorse his initials and the time of sending thereon, and all messages filed each day were required to be checked over to ascertain from the check marks if they had

been transmitted, and the messages for each day at the close of business were bound together and filed away.

## XII.

That the telegram to plaintiff set forth above was received by the counter receiving clerk, Margaret Brown, now Mrs. Margaret Holland, and marked with her initials, and was by her inadvertently put in a file of messages which had been placed in the Company files prior to the date of such telegram, and when inquiry was made at the office of defendant by plaintiff in February, 1918, such telegram was found in said file of back date business and bore no perforation showing it had ever been placed on the sending hook, and no operator's check mark.

## XIII.

That the clerk, Margaret Brown, was a capable and efficient employe, and the non-transmission of the telegram was due to her inadvertence and was not due to any wilful, malicious or wanton act on her part.

## XIV.

That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence unless the failure to transmit a telegram constitutes gross negligence *per se*.

## XV.

In deference to what is understood to be the view of the Circuit Court of Appeals, it is found that if plaintiff had received the telegram promptly he would have accepted the offer and could have delivered the stock in time to avail himself of such offer.

## XVI.

That on February 14, 1918, plaintiff first learned that said telegram had been filed and the sender, T. J. Jones, that it had not been delivered, and upon that date together they made inquiry at the defendant's Boise office, whereupon after investigation, Mr. Hackett, Manager of the Boise office, addressed a letter to the sender, dated February 14, 1918, acknowledging the failure to transmit, and tendered the return of the charges paid, which letter was introduced in evidence as plaintiff's Exhibit No. 2. Sometime after this letter, Mr. Hackett went to the office of the sender, Mr. Jones, under directions from the District Commercial Superintendent of defendant, to ascertain the facts concerning the claim for damages, and as part of his general duty to make a report of the facts concerning all claims.

## XVII.

That there was no written or formal demand for damages by plaintiff until June 18, 1918, at which time he wrote the letter introduced in evidence as

plaintiff's Exhibit No. 4, claiming damages in the sum of Forty-five Hundred Dollars (\$4,500) and in response to this demand, promise was made to investigate, but without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank.

### XVIII.

That the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted, and has continued so to be.

### CONCLUSIONS OF LAW.

1. That the acts of defendant and its employes do not constitute a waiver of the provision requiring claim for damages to be made in writing within sixty days of the time the message was filed with defendant.
  2. It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not transmitted at all, it is accordingly held that plaintiff is entitled to judgment for damages in the sum of Forty-five Hundred Dollars (\$4,500) with interest thereon from the 18th day of June, 1918, at the rate of 7% per annum, together with costs of suit.
- Let judgment be entered accordingly.

Dated this 11th day of March, 1922.

FRANK S. DIETRICH,

*Judge.*

Endorsed, Filed March 11, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

### JUDGMENT.

This cause having come on regularly for hearing on the 18th day of February, 1922, before the Court, without the intervention of a jury, (the parties through their attorneys of record having before the commencement of this trial filed with the Clerk a stipulation in writing, waiving a jury), Messrs. Johnson and Nixon, appeared for plaintiff, the Messrs. Richards & Haga, appearing for defendant; and the Court having heard the evidence in the case, and the arguments of the attorneys for the respective parties, and the cause having been submitted to the Court for its consideration and decision; and on the 11th day of March, 1922, Findings of Fact and Conclusions of law having been filed by the Court herein, and the Court having ordered that in accordance with said Findings of Fact and Conclusions of Law judgment be entered in favor of the plaintiff and against the defendant for the sum of Forty-five Hundred (\$4,500) Dollars, with interest thereon from June 18, 1918, at

the rate of Seven per cent. (7%) per annum, together with costs of suit;

NOW, THEREFORE, By virtue of the law and by reason of the promises it is ordered, adjudged and decreed by the Court, that J. A. Czizek, plaintiff herein, have and recover of and from the Western Union Telegraph Company, defendant herein, Five Thousand Six Hundred and Sixty-three and 35/100 (\$5,663.35) Dollars, together with plaintiff's costs herein taxed at \$261.95 Dollars, and have execution thereof.

Signed and entered this 11th day of March, 1922.

FRANK S. DIETRICH,

*District Judge.*

Endorsed, Filed March 11, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

### BILL OF EXCEPTIONS.

Be it remembered, That pursuant to mandate of the Circuit Court of Appeals herein the above entitled cause came on for trial *de novo* in the above entitled Court at Boise, in said District of Idaho, Southern Division, before the Honorable Frank S. Dietrich, on the 18th day of February, 1922, upon the issues joined in the pleadings without a jury, the parties hereto having theretofore filed a stipulation in writing waiving a jury, Messrs. Richard

H. Johnson and Carey H. Nixon appearing for plaintiff, and Messrs. Richards & Haga appearing for defendant.

The following constitute all the stipulations filed, proceedings had and evidence, oral and documentary, introduced at said trial.

The stipulation waiving a jury and providing for the use of the testimony taken on the former trial herein is as follows:

“(Title of Court and Cause.)

#### STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled action, through their respective attorneys, as follows:

1. The parties to said action hereby waive a jury trial and consent that said action may be tried by the Court without a jury.
2. That the testimony taken on the former trial herein may be considered as taken in this cause to the same extent as if the witnesses were produced and sworn upon this trial, subject, however, to all legal objections shown by the record on the original trial herein.
3. That in addition to such testimony the evidence herein shall be confined to the testimony of G. H. Hackett and Mrs. Margaret Holland, as shown by stipulations dated February 17th, 1922, and to such additional evidence upon the question of value of the stock of the Idaho National Bank as may be produced by either party herein.

Dated this 17th day of February, 1922.

RICHARD H. JOHNSON,

CAREY H. NIXON,

*Attorneys for Plaintiff.*

RICHARDS & HAGA,

*Attorneys for Defendant."*

Thereupon counsel for plaintiff offered in evidence as Plaintiff's Exhibit 1 a typewritten transcript of the testimony taken on the former trial herein, and the same was admitted in evidence pursuant to the above stipulation and subject to all legal objections shown by the record on such former trial, and at the request of counsel for both sides the Court ordered that all adverse rulings of the Court should be deemed to have been excepted to. It was further agreed in open court by the attorneys for the respective parties that the offer of said transcript included the exhibits of both parties offered in evidence at the former trial in connection with the oral testimony, and thereupon counsel for plaintiff rested his case.

The following constitutes all of the evidence, oral and documentary, referred to as having been introduced at the former trial and considered as taken herein pursuant to the said stipulation:

T. J. Jones, produced as a witness on behalf of plaintiff, being duly sworn, testified as follows:

"I am sixty-two years of age and reside in Boise, Idaho, and am a lawyer by profession. I am acquainted with the plaintiff, J. A. Czizek, and prior

to November 30th, 1917, I was acquainted with one David Miller and was also acquainted with an institution known as the Idaho National Bank. I was a stockholder in that bank prior to December 4th, 1917, and owned individually, fifteen shares of stock. The par value of that stock was \$100.00 a share. Prior to November 30th, 1917, or along during that month or in October, I had a conversation with the plaintiff, Mr. Czizek, with reference to the bank stock. Mr. Czizek and I were both stockholders. I had fifteen shares and Czizek had fifty. As I was here practically all the time and Czizek was here only occasionally, it was understood."

MR. MORROW: If the Court please, we object to the understanding between Mr. Czizek and Mr. Jones—

A. Well, it was agreed—

MR. MORROW: For the reason that counsel, by the amendment to the pleadings made some time ago, based his complaint upon the theory of a legal duty, making this in essence a tort action for breach of legal duty to transmit this telegram, and I think that if counsel is going to proceed upon the theory, which was apparently the theory of the original pleading, that there was an arrangement between Mr. Jones and Mr. Czizek, and the telegram was sent pursuant to that arrangement creating an agency, that he should be required to make

his position clear at this time, and I don't think that under the amendment to the pleadings, where he struck out the allegation of a promise to send this telegram, I don't think that this evidence is material or competent.

The Court overruled the objection, to which ruling defendant was allowed an exception by the Court.

WITNESS: It was agreed that neither of us was to sell unless we both sold, and that we were to try and get par, that is, the par value of the stock. Yes, in another conversation there was something said with reference to Mr. Miller being a possible purchaser. The last talk I had with Mr. Czizek prior to the sale of the stock which I think was in November, possibly in October, Mr. Czizek said that Mr. Miller would be here and he would have plenty of money to take care of and buy all the stock that Miller might deem was necessary to get control of the Idaho National or to consolidate with the Pacific National and make one god bank out of the two. And I knew that Mr. Miller was negotiating with the Pacific National Bank and I knew from talks that I had had with Miller that he was negotiating to build up the Idaho National Bank.

MR. MORROW: If the Court please, we move to strike the statements made as to what Mr. Czizek said, as distinguished from what the witness knew

himself, on the ground that they are hearsay, and do not tend to prove that Mr. Miller was preparing to buy this stock.

MR. JOHNSON: We didn't offer it for that purpose, Your Honor.

THE COURT: The objection is overruled.

Thereupon the Court allowed defendant an exception to said ruling.

The witness continued:

Mr. Miller at that time was Vice President of the Idaho National. He then owned stock at that time. He had paid me for what was known as the Fletcher stock, \$15,000 for two hundred shares. I had a good many conversations directly with Mr. Miller with reference to this stock.

Q. (By MR. JOHNSON): Well, it is not necessary to detail them all, but what was it in substance?

MR. MORROW: If the Court please, we object to any evidence as to conversations had by the witness with Mr. Miller regarding the purchase of the stock in question, being the stock of the plaintiff, or other stock of the Idaho National Bank, about this time, on the ground that it is hearsay and incompetent, irrelevant, and immaterial to prove or disprove any of the issues in this case, the question being, under the pleadings, and being placed in is-

sue, that at the time this telegram was sent and shortly thereafter Mr. Miller was ready and willing to purchase the plaintiff's stock, and we think that evidence as to what Mr. Miller may have told the witness is clearly hearsay, and object to it on that ground, and on the ground that no proper foundation has been laid for the introduction of such evidence.

THE COURT: What do you offer this for, Mr. Johnson?

MR. JOHNSON: We don't offer it for the purpose of proving what Mr. Miller's action might have been, but merely the facts leading up to the sending of this telegram as allaged in the complaint. We will offer other proof on the other question.

THE COURT: Well, with that understanding, I think I shall let it go in, as merely explanatory of the circumstances.

MR. JOHNSON: That is all right.

Whereupon the Court allowed defendant an exception to said ruling.

The witness continued:

A. Well, the conversation on the 30th of November I think was in 1917, that is, the day the message was sent, Mr. Miller wanted to know what stock I controlled and could deliver and I told him sixty-five shares, my stock and Czizek's stock. This

conversation took place in Boise on the street. And I think later in the day Mr. Miller came up to my office, and we made an appointment for that evening, in the Idaho National Bank; and that evening we met in the Idaho National Bank, and there was present Mr. Miller and myself in the front end of the bank, and in the rear end of the bank Miss Nellie Wilson was present, and we took up the question of the stock, and he offered \$90.00 a share for the 65 shares, mine and Czizek's, and started to get a statement showing that that was all the stock was worth at that time, and stated that his purpose in getting the stock was so that he could control the bank, and if he didn't get the stock that the bank would go into liquidation, and it would be a year or eighteen months before we would get anything, and if the bank realized on all its papers the surplus funds, the most we could hope to get would be \$110.00 a share, and we might not get anything. At that point I interrupted him, and I said, "Miller, there is no use in discussing the purchase of this stock unless you have got the money to pay for it, a cash transaction." And as I recall it, there was a book lying on the counter—the desk run this way, and inside there was a long counter, and there was a book lying there. He says, "There is the books and there is Nellie," meaning Nellie Wilson. "And I went over to Nellie, and I said, 'Nellie, Miller is figuring on buying this stock.' And she said, 'Does that include Czizek's stock?' and I

said, 'Yes. Has Miller the money to pay for it?' She said, 'Sell. He has got money enough here to take care of any check that he will issue for you.' I got Czizek's address from Nellie. The bank had his address. And went back to Miller and pencilled a telegram and read it to Miller, and he said it was satisfactory, and I took it back to Nellie, and she run it off in triplicate. I came back to Miller and read the telegram, and I struck out one word and he added one word. The word I struck out was "here" and I wrote in ink "year". And he wrote in ink at the end of the message the word "answer".

MR. JOHNSON: I would like to have this marked as Plaintiff's Exhibit No. 1 for identification.

Said document was thereupon marked Plaintiff's Exhibit No. 1.

WITNESS: Plaintiff's Exhibit No. 1 for identification is a telegram, the telegram that I prepared in triplicate in the bank on that evening. It is one of the three. I gave one to Miller and I took the other two up to the office. I left one in the office and I gave the other to my son Felix and told him to take it up to the telegraph office right away and pay the charges and send it.

Thereupon the paper marked Plaintiff's Exhibit No. 1 for identification was introduced and admitted in evidence and said paper is in words and fig-

ures identical with the telegram set out in the special findings of fact herein except that the pencil notation in the upper right hand corner "M. B. 60" "49 pdnl" and the pencil notation in the lower right hand corner "(454 Yates B)" "(65c)" "(408 W)" do not appear upon said Exhibit 1.

The witness continued:

Mr. Miller wrote the word "answer" in pen at the end there on the telegram, and I struck out the word "here" and wrote "year". When I left the bank and took the two copies of the telegram up to my office, my son Felix Jones and I think his brother Tom were present in my office. I then gave the telegram to Felix and I think I put the other copy in the safe. I gave directions to my son Felix to take the telegram immediately to the telegraph office. First I told him to go to the safe and take sufficient money and to go to the telegraph office and send that telegram and prepay the charges. He then left with the telegram. My recollection is that the 30th of November of that year was a Friday and that this was a Friday evening, and the next day Mr. Miller came up to the office and wanted to know if I had heard from Czizek and I told him no. He said he was very anxious to get this stock and any other stock that I had, and said we could go ahead and close the deal, and that if I didn't have the Czizek stock that could be put in later. He seemed to have the impression that I

had the Czizek stock—and as to the probability of the message being delivered. I said, “Well, the company would have until noon to deliver the message and Czizek might not be in the house at the time, and we would leave it go until evening.” Czizek’s address that I got at the bank is the address that is on that telegram, in the city of Oakland, California. Continuing my conversation with Mr. Miller I said that the next day being Sunday intervening, it wouldn’t really make very much difference, so on Sunday I requested Felix to go to the telegraph office and see if he could get any information with reference to that telegram, and he came back and reported that—

MR. MORROW: We object to what he reported.

THE COURT: Sustained.

MR. JOHNSON: That was merely, Your Honor, not to suggest that the telegraph company made any such statements as that, but merely to show the connection of his conversation with Miller, explanatory, so that we could understand Miller’s subsequent actions. I expect to offer other evidence as to what he told him.

THE COURT: Very well. With that understanding.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He reported to me that the telegraph office said the message had been delivered to Czizek at Oakland, California. That was what I told Mr. Miller. Then on Monday Mr. Miller came up and he wanted to know if I had heard anything from Czizek and I told him no. That would be Monday. That would be the 3rd of December. And he wanted to know if he was in town, and I said I had stopped at the Idanha and he wasn't there, and I went and called up the Idanha and they said he wasn't there. Miller said he thought he was on his way to Boise. I said I thought he was, too, having received that telegram and not having answered, that I thought he was on the way and had the stock with him. Then Miller said to me—

MR. MORROW: We object to further testimony as to what Mr. Miller may have said, on the ground that it is hearsay and incompetent. The evidence that has already gone in I think is merely explanatory, but anything further that was said must necessarily relate to matters arising after the telegram was sent, and, if relevant at all, would have to bear upon the issue of Miller's readiness and willingness to buy that stock at that time, on the 3rd day of December.

MR. JOHNSON: This is merely explanatory, if the Court please.

THE COURT: I think I shall let it go in. You may continue.

To such ruling defendant was allowed an exception by the Court.

WITNESS: Miller said to me, "You transfer your stock"—my individual stock. That is the first time that I recall now that my individual stock came up. "I am going down to Salt Lake, and I will try and see Czizek, and if I do I will close with him there; and if I don't see him and he comes through, the money is in the bank. I have given instructions to the bank to turn the money over." The money could have been put, according to Miller's statement, could have been put to my credit or Czizek's. Miller was willing at any time to pay the money if I would agree to turn over the stock or see that it was turned over. I told him at that time that I wouldn't deliver my stock, that it was selling for less than par, and I wouldn't break my word to Czizek for \$1350.00, and he represented that at any time that Czizek and I would take the money and the stock would be delivered, that it would be paid for, that the bank would pay for it, and all I had to do was to take it to the bank, or, if I preferred, the money would be placed to credit as I would designate. At that time I told Miller that I wouldn't sell my stock until Czizek's and mine went together. Yes, my office is in the same building as the bank. Later in the day Mr. Miller called me up and asked me to come down to the bank, and I think I went down, and Miller asked me if I had the stock with me, and I told him no;

and we had another conversation about the stock, and he came up to the office, and he said that I was interfering with his plans by not closing the deal, and to that extent was hurting the bank, and that there couldn't be any possible injury to Czizek or anybody else by closing the deal; and that he was going out of town, and he wanted the matter closed. I again refused to turn the stock over, but after he went out, in talking the matter over with Felix, I took my stock and went down to the bank. I said to Miller, "I have my stock." He said, "I am going out of the bank; put it on my table. When I come in I will give you a check or put the money to your credit." I went over to the table and put my stock on his table, unendorsed, and went down in the afternoon, and Miller was in the bank. And I said, "Miller, I have left my stock on your table unendorsed." He said, "I wouldn't give you your check until it was endorsed." I said, "Neither would I endorse the stock until it was paid for; this is a business transaction. If you want the stock give me your check and I will endorse it." He wrote a check for \$1350.00, and I took the check over to the cashier and had it cashed and entered in my bank book, and went back and endorsed the stock.

I next saw the plaintiff, I think, about the middle of February, 1918. I met him at the corner of Ninth and Main streets in Boise, Idaho. I had a conversation with him there. After we had shook hands, I said to him, "Why in hell didn't you an-

swer my telegram?" He said, "What telegram?" I said, "That telegram that I sent you to Oakland. I had your stock sold." He said, "I never got the message." I said, "The office reported that it was delivered to you at Oakland, California." He said, "Did the office say that?" I said, "Yes." He said, "Let's go up to the office." We went over to my office, and I gave him, Czizek, this triplicate of the telegram that I had in my office. Yes, I am sure about giving him this triplicate of the telegram I had in my office. And we went up to the telegraph office together, and Mr. Czizek asked for Mr. Hackett. Mr. Hackett came up to the counter. Mr. Hackett was supposed to be the manager of the Western Union. He had been there a long time. Czizek read this telegram to Hackett, and Hackett asked Czizek to let him see it, and Czizek handed it to him, and Hackett turned to go away with the telegram, and I objected, and he handed it back to Czizek and said he would look it up and let us know later. And Czizek and I left the telegraph office together. Either that day or the next day or the following day, within a day or two, I received a letter from Mr. Hackett and in that letter was enclosed a check or a draft for I think sixty-five cents; anyway, it was the amount of money that Felix had paid for sending the message.

MR. JOHNSON: I will ask that this paper be marked as Plaintiff's Exhibit No. 2 for identification.

Said paper was thereupon marked Plaintiff's Exhibit No. 2.

WITNESS: This paper marked Plaintiff's Exhibit No. 2 for identification is the letter that I received from Mr. Hackett enclosing check. I am not sure whether it was a check or a draft for sixty-five cents. Yes, that is the original letter.

Thereupon the letter was offered and received in evidence, and marked Plaintiff's Exhibit No. 2, and is in words and figures as follows:

(Letterhead of Western Union Telegraph Co.

"Boise, Idaho, Feb. 14, 1918.

"T. J. Jones, Atty. at Law,

"Boise, Idaho.

"Dear Sir:—

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls.

"Yours truly,

"G. H. HACKETT, Manager."

WITNESS: Either the day that I received the letter and check or the next day or maybe the day after that, I wrote Mr. Hackett a letter returning

the check or draft, whichever it was. I kept a duplicate of that letter.

Thereupon, Plaintiff's Exhibit No. 3 was offered and introduced in evidence, and is in words and figures, following:

"JONES & JONES,  
Lawyers  
BOISE, IDAHO,

"Feb. 18, 1918.

"The Western Union Telegraph Co.,

"G. H. Hackett, Manager.

"South 8th St., Boise, Idaho.

"Gentlemen:—

"Your letter of Feb. 14, 1918, to hand, containing your check No. 62 dated Boise, Idaho, Feb. 14, 1918, on First National Bank of Idaho, Boise, Idaho, payable to the order of T. J. Jones in the sum of \$0.65.

"Toll paid on message filed in your Boise office Nov. 30, 1917, addressed to J. A. Czizek, Oakland, Cal., which you say failed in transmission.

"An acceptance of the check on my part might be construed as a settlement of the matter. I therefore return check to you.

"Yours truly,

"T. J. JONES,"

WITNESS: After I had replied to Mr. Hackett's letter returning the check or draft, whichever it was, Mr. Hackett came up to my office and he said—

MR. MORROW: We object to what he said. It is not shown that any statements he made were in the course of his employment or binding upon the defendant.

MR. JOHNSON: Q. Was he General Manager of the company at that time?

A. He said he was.

THE COURT: The objection is overruled.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He said. "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." I said, "All right." He said, "It is unfortunate that it didn't go through, and the company will settle it. There is no question about their liability," or words to that effect.

MR. MORROW: We move to strike out the last statement about liability, because it is a conclusion.

MR. JOHNSON: It isn't binding on the company—we realize that, Your Honor. It is merely explanatory.

THE COURT: Very well.

To which ruling defendant was allowed an exception by the Court.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock—

THE COURT: Well, now, apparently this isn't very material, do you think?

MR. JOHNSON: It is only material as to what follows, Your Honor, with reference to some further questions that he asked him. And then it has materiality in this way, in connection with some further facts that I intended to prove, in an attempt to show a waiver by the company of the sixty-day provision set up as a defense, this among various other circumstances which I will argue to the Court constituted the waiver. This is just one circumstance connected with others, and while possibly of itself it would be subject to the objection, I thought that after the testimony was in the Court could give it such legal effect as he thought necessary, as long as this case wasn't being tried before a jury, and I would introduce it.

MR. MORROW: We wish to make the further objection that it is apparently—it didn't develop until this last statement—that it is an offer or some negotiations concerning a compromise of the claim, and I don't think that is admissible.

MR. JOHNSON: Well, it isn't seeking to establish that the company has admitted its liability.

THE COURT: I would be quite clear that it isn't proper evidence at the present time if you were trying the case before a jury. Isn't it more properly rebuttal if you are offering it only for the purpose suggested, a waiver of that defense?

MR. JOHNSON: Possibly it would be, Your Honor, more in the nature of rebuttal, but if that

particular objection isn't raised, I would like to have Mr. Jones testify at this time, because his health is very poor and he has to leave here in a very short time.

MR. MORROW: We wouldn't care to make the objection, in view of that situation, Your Honor, on the ground that it is properly rebuttal, but I want to call attention to the further fact that the contract provides that no employe is authorized to vary the foregoing provisions, including the sixty-day provision, so the only possible competency of this evidence would be on the ground of this question of waiver, and I think that is sufficiently clear upon that provision, that Mr. Hackett couldn't waive that by any statement he might make.

MR. JOHNSON: I realize that there is perhaps a question of law there, which perhaps we would better take up in the argument of the case. There are some authorities that hold that a manager can waive those provisions, and there are numerous other matters in connection with the waiver that I think should perhaps all be taken together, and the Court can give them the legal effect necessary.

THE COURT: Well, perhaps we can get at it more directly and more briefly in that way. You may proceed.

MR. JOHNSON: Q. Go ahead.

WITNESS: What was the last question?

MR. MORROW: Do I understand the objection is overruled?

THE COURT: No. The testimony will be admitted, subject to the objection.

Upon final consideration of the case the Court admitted the testimony and allowed defendant an exception to such ruling.

The last question was read to the witness.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" I said, "Yes." He asked me what the stock was worth and I referred him to Mr. Streeter, the cashier. He said, "I would like for you (meaning me) to fix the value, as I think you would be fair, and I have taken this matter up with the company." He said, "As I understand it, the banks have guaranteed the depositors, and there can't be any liability attach to the stockholders." I said that statement was only partially correct, that instead of the stock being worth something, the liability might attach to the stockholders, as the banks had only guaranteed the depositors, and hadn't guaranteed any of the indebtedness of the bank, if there was any. Well, I think that that was all that was said at that time that related particularly to this matter. If I had any further conversation with him after that time I do not recall.

## CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: The date on which I sold my stock and got this check was the 4th of December, 1917. No, this telegram was not written in my office at all. It was written down at the bank, in triplicate. We used that blank of the company, the same as that one that was introduced in evidence, for all three of the telegrams. All three of them were on the same form as Plaintiff's Exhibit No. 1. I think they were on the same form. I know the wording was the same in all of them.

MR. MORROW: Will you mark that as Defendant's Exhibit A?

A certain paper was thereupon marked Defendant's Exhibit A, which was read by Mr. Morrow to the witness, and is in words and figures the same as Plaintiff's Exhibit No. 1.

WITNESS: Yes, these two are part of the three triplicates. These two are two of the three triplicates.

(Witness excused.)

J. A. CZIZEK, the plaintiff, produced as a witness on his own behalf, being duly sworn, testified as follows:

## DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is J. A. Cizek, my age 55,

my residence, Oakland, California. I am acquainted with a bank known as the Idaho National Bank. I am a stockholder in that bank. I own fifty shares of stock. The par value of that stock is \$100. I owned fifty shares of stock in the month of November, 1917. I was acquainted at that time with one David Miller, and also with T. J. Jones, the witness that just testified.

Q. State whether or not you had a conversation with Mr. Miller some time along in October or the first part of November, 1917, with reference to the Idaho National Bank.

MR. MORROW: If the Court please, we object to that conversation, if it relates to the shares of stock, or a sale of the shares of stock owned by the plaintiff, to Mr. Miller, on the ground that Mr. Miller's statements in regard to that would be hearsay and not competent.

MR. JOHNSON: This is simply in line with the allegations of the complaint, Your Honor, and is explanatory, and leading up to the sending of the telegram.

MR. MORROW: The fact is in evidence that the telegram was admitted. And it seems to me that counsel is attempting to put in his case here on the statement to the Court that all of his evidence is explanatory of something, and I don't think the mere fact that it is merely explanatory excuses

it if it is hearsay, and offers to prove one of the substantive issues in the case.

THE COURT: Is this the talk with Mr. Miller?

MR. JOHNSON: Yes, this is the talk with Mr. Miller which led up to the conversation that the plaintiff had with Mr. Jones with reference to the sale of the stock, that they would both sell their stock together, which resulted in sending the telegram, and it is alleged in the complaint, and was taken up on the demurrer.

THE COURT: Very well. He may answer.

To which ruling defendant was allowed an exception by the Court.

WITNESS: I came from my operations in central Idaho to Boise along about the middle of November. I would judge, in the year 1917. Prior to this I had received several communications from Mr. Miller about things generally with reference to bank, etc., and the question of purchasing the stock or entering into a merger with the Pacific National Bank that he talked to me about, was discussed. I told him I didn't want to enter into any merger, that I wanted to sell my stock. I had had some bad bank stock experience, and I didn't want to have the stock. We discussed the value of it pro and con for a little while and didn't arrive at anything, because I learned that he was not ready just then to buy it, but he told me he was going away at

that he would be back at a certain time, or near a certain time, when he would be ready to negotiate with me further, and we would have no trouble about agreeing on the price, and he would buy my stock. Yes, I had a conversation after that with Mr. T. J. Jones with reference to this matter. After Miller and I had our talk, I went to Mr. Jones, who was also a stockholder, that I knew, and we had talked about this matter more or less at different times, and told him what Mr. Miller told me, that he would be back with the money to buy our stock, and this merger that he talked of, and that I wanted him to negotiate with him for me, that we would sell together. He wished to buy both our holdings together. I afterwards told Mr. Miller after talking with Mr. Jones, that Mr. Jones could negotiate for me, and I left for California. I left Boise within a day or two after that. My address was always in the Idaho National Bank. My Oakland address at that time was 5767 Shafter Avenue, Oakland. I was at my home in Oakland continuously between November 30, 1917, until about shortly after the first of February, excepting little drives out in the country. I did not receive any telegram from Mr. T. J. Jones. I received nothing with reference to the bank stock.

Q. If you had received that telegram, Plaintiff's Exhibit No. 1, what would have been your attitude with reference to this stock?

MR. MORROW: If the Court please, we object to evidence as to what his attitude would have been, on the ground that it is incompetent, irrelevant, and immaterial. I would like to state that objection a little more in detail, if the Court please. And particularly for the following reasons: Because the witness is asked his present opinion on a past condition of things that never existed, but is now summoned before his mind as conjecture. He is asking the present opinion of the witness as to what he would or would not have done in a stated contingency. It is contrary to public policy, as tending to encourage corrupt testimony, and has a vicious tendency. The allegations of the complaint show that plaintiff did not suffer any actual loss other than a possible opportunity, for which a recovery is precluded under the law. The telegram shows that the sender was asking information or advice as to whether or not he should sell his own stock. The telegram is in evidence, and the Court can determine that. The complaint shows that there was no obligation out of which any loss could have resulted. The damages sought are too uncertain, contingent, and remote, to render any testimony in relation thereto competent. The sale of said stock depended upon the independent will of the plaintiff, and that was a contingency that precludes recovery and renders the testimony incompetent. And the sale of the stock also depended on the indepen-

dent will and ability of the party referred to, David Miller, to purchase the stock, and that also is a contingency which precludes recovery and renders the testimony incompetent. In other words, Your Honor, we are objecting to any evidence as to what this witness' attitude would have been if he had received this telegram, because he has just testified that he didn't receive it. And if the Court cares to go into this matter at this time we have the authorities I think that amply sustain our position.

THE COURT: I think I shall receive the testimony subject to the objection. It may be rather a nice question as to whether it is competent. You may proceed.

MR. JOHNSON: Go ahead, Mr. Czizek.

WITNESS: The question, please.

(Question read.)

A. I would have sold it. I was seeking to sell it.

Q. What would your reply have been to the telegram if you had received it and answered it?

A. To accept it.

MR. MORROW: May it be understood that this same objection goes to all this class of testimony?

THE COURT: Yes.

A. I should have wired a reply of acceptance.

Upon the second trial herein, out of deference to what was understood to be the ruling of the Circuit Court of Appeals upon said question the Court overruled said objection, admitted the evidence and allowed defendant an exception to such ruling.

WITNESS: After that time I returned to Boise about the 13th or 14th of February, 1918. I had not seen Mr. Miller in the meantime. I saw Mr. Jones after my return to Boise. I am not certain whether it was the same day I arrived or the following day, I met Mr. Jones on the street. He immediately wanted to know why I didn't reply to a message he sent me about the bank stock. I told him I hadn't received any message about the bank stock. Well, he had sent me a message and everything was all fixed. And among other things, he invited me to his office and showed me a copy of a message he had sent, or a message that was supposed to have been sent to me. We discussed the thing a little bit, and I suggested that we go down and see Mr. Hackett. We went down to the telegraph office and I called for Mr. Hackett personally and discussed the matter with him. I was very well acquainted with Mr. Hackett for twenty years or more. Well, Mr. Hackett felt rather bad about this, and I was a little bit angry. Well, that was about all there was to it. We left the office and he said that he would look it up and find out who was to blame. Yes, he handed me a telegram—returned

me one. I don't know whether it was the original or whether it was a copy, I am not certain. But he promised to take the matter up and I let it go at that, and he did later on. I think I gave the telegram that he handed me to Mr. Jones for safe keeping, or something. We took it with us. Yes, that was the telegram that was introduced in evidence, marked Plaintiff's Exhibit No. 1. That is the only one I know anything about, supposed to be a copy of the original. I afterwards gave it to my attorney in this suit. No, I am not clear on the point at this time whether it is the one Mr. Jones had or whether it was the original that Mr. Hackett had. The next occurrence that I recall with reference to this dispatch was, I was called into Mr. Jones' office and he showed me a letter that he had received from Mr. Hackett. That was a day or two later. I don't know whether it was the following day, but it was shortly after I had talked to Mr. Hackett. He said, "I have got a sixty-five cent check or draft here." And we decided we shouldn't accept it, to send that back. Yes, that was a letter that was introduced, marked Plaintiff's Exhibit No. 2, the letter from Mr. Hackett to Mr. Jones. I don't think Mr. Miller was in Boise at that time. No, I am quite satisfied he wasn't, because I would have seen him. Yes, I received a communication from the defendant at that time—an agent, or somebody in Salt Lake, an attorney or somebody from Salt Lake I think it was. I addressed a com-

munication to the defendant company, and I kept a copy of it. This was, I think, at the suggestion of Mr. Hackett, and set forth the case as well as I could to this attorney, I think it was, in Salt Lake.

A certain document was thereupon marked Plaintiff's Exhibit No. 4 for identification.

WITNESS: This is the original letter I addressed to the agent or the manager at Boise, for the attention of Mr. Hackett of the Western Union Company. That was done at the suggestion of Mr. Hackett, and I think he sent it on, at least I got a reply from Salt Lake City.

Thereupon, the paper marked Plaintiff's Exhibit No. 4 for identification was offered in evidence.

MR. MORROW: We would object to this, for any other purpose than that of showing that a claim in writing was made to the company on this date, and for the reason that a number of statements therein are self-serving, and further the general objection to the testimony relating to what the plaintiff would have done if he had received the telegram, the same objection that we made a few minutes ago to other testimony along that line.

THE COURT: Well, it will be received only for the purpose suggested.

MR. JOHNSON: Yes, it is only for the purpose of showing, Your Honor, that a claim in writing was made on that date.

MR. MORROW: Well, it is competent for that.

MR. JOHNSON: I will read it to the Court.

THE COURT: That is unnecessary. If you will just let me have it.

MR. JOHNSON: All right.

Plaintiff's Exhibit No. 4 was thereupon admitted in evidence, and is in words and figures as follows:

"Boise, Idaho, June 18, 1918.

"Western Union Telegraph Company,

"Boise, Idaho.

(Attention Mr. Hackett, Manager.)

"Gentlemen:

"After complete investigation, I find that on the 30th day of November, 1917, a telegram was addressed to me, properly directed to my address, 5767 Shafter Avenue, Oakland, California.

"The letter admitted me of the opportunity to sell fifty (50) shares of my stock in the Idaho National Bank at a price of Ninety Dollars a share or a total of Four Thousand Five Hundred Dollars.

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me.

"It was sent to me by my associate and agent, Mr. T. J. Jones of Boise, Idaho.

"After being delivered to your Company the price of the telegram was paid by Mr. Jones for me, and instead of the telegram being sent it was pigeon holed in Boise, although on December 2, 1917, there being no response to Mr. Jones' inquiry, he sent his son to the tele-

graph office to ascertain whether the message had been sent, and Mr. Jones was informed by one of the employes of the office that the message had been delivered.

"Again, on December 3, 1917, Mr. Jones' son, Felix T. Jones, went to the office in Boise, Idaho, and inquired about the delivery of the message, and your employee specifically replied that the message had been sent and delivered to you on December 1, 1917.

"Whereupon Mr. Jones decided that I did not care to sell my stock, and the opportunity for selling it passed.

"I was not aware of the transmission of this telegram until my return to Boise, about the middle of February, 1918, at which time, in company with Mr. Jones and his son, we went to the Western Union office and there found that the message had never been sent to me, but was still in the office. Whereupon Mr. Hackett delivered to me the original message, which I now have in my possession.

"He also attempted to return the toll, and the next day sent your check No. 62 in the sum of Sixty-five cents. This check was refused and Mr. Jones returned it saying that he did not care in any way to waive any claims which might arise for damages.

"I now demand, by reason of your negligence, the sum of \$4500.00, with interest thereon at the rate of seven per cent per annum from and after the 9th day of December, 1917. Unless this matter can be settled and adjusted I will be obliged to seek my remedy in the Court.

"Please address me c/o Overland National Bank, Boise, Idaho.

"Yours very truly,

(Signed)

"J. A. CZIZEK."

WITNESS: Yes, I received a reply to that communication.

Thereupon an envelope was marked Plaintiff's exhibit No. 5 for identification, and a letter was marked Plaintiff's Exhibit No. 6 for identification.

WITNESS: No. 5 is an envelope addressed to me from Salt Lake City, and contains this letter, Exhibit. No. 6, which seems to be a reply to my letter and is signed by U. G. Life, District Commercial Superintendent.

Thereupon, Plaintiff's Exhibits Nos. 5 and 6 for identification were offered in evidence.

MR. MORROW: I don't think it is material, but there is no particular objection. The objection rather goes to the weight of it.

Thereupon, these exhibits were admitted in evidence and were marked Plaintiff's Exhibit Nos. 5 and 6 respectively. Plaintiff's Exhibit No. 5 is an envelope upon which is printed, in the upper left hand corner, the return card of the Western Union Telegraph Company, Salt Lake City, and the name Mr. J. A. Czizek, Care Overland Natl. Bank, Boise, Idaho, is printed on the envelope, and a pencil line is drawn through the words Care Overland Natl. Bank., Boise, Idaho, and the address, Warren, Idaho, in pencil written in place thereof. Plaintiff's Exhibit No. 6 is in words and figures following, to-wit:

**THE WESTERN UNION TELEGRAPH  
COMPANY**

**"Mountain Division"**

**"U. G. Life,**

**"District Commercial Superintendent.**

**"Salt Lake City, Utah, July 2, 1918.**

**"Mr. J. A. Czizek,**

**c/o Overland National Bank,**

**"Boise, Idaho.**

**"Dear Sir:**

"Acknowledging receipt your favor June 18 addressed this Company, Boise, Ida., making claim against the Company for \$4500.00 alleged loss sustained by alleged failure in transmission message filed Nov. 30, 1917 addressed to yourself at Oakland, Cal., signed T. J. Jones; beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further.

"However, more than 60 days have elapsed since date claim message was filed, our investigation will be conducted without prejudice to the situation created by your failure to bring matter to our attention at an earlier date.

**"Yours truly,**

**(Signed) "U. G. LIFE, Dist. Com'l Supt."**

MR. JOHNSON: Here is a letter that perhaps should have come before the other two. I will ask that this letter be marked as Plaintiff's Exhibit 7.

Said letter was thereupon marked Plaintiff's Exhibit No. 7.

WITNESS: This paper marked Plaintiff's Exhibit No. 7 is a letter from Mr. Hackett that prompted the writing of that letter there, Plain-

tiff's Exhibit 4. That was received prior to my writing that letter, and was received by me.

Thereupon Plaintiff's Exhibit No. 7 was offered and received in evidence without objection, and is in words and figures following, to-wit:

"THE WESTERN UNION TELEGRAPH  
COMPANY

"Incorporated

"Manager's Office, Boise, Ida., June 19, 1918.

"J. A. Czizek,

"Boise, Idaho.

"Dear Sir:

"Your favor 18th instant received and I have forwarded same to our Company for consideration. Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?

Yours truly,

(Signed) "G. H. HACKETT, Manager."

CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: On November 30th, 1917, about that time, this blank stock was in Oakland. It was in the Bank of Italy. It was there with other collateral at the time, for a loan. No, not the Bank of Italy in San Francisco, in Oakland. Well, I beg your pardon, at that time that was the Security Bank. It is now a branch of the Bank of Italy, taken over by the Bank of Italy since. It was then known as the Security Bank.

## RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: Yes, sir, at that time this bank stock that I owned in the Idaho National was available to me to sell. I was in a position to deliver the stock at any time.

Yes, I could have obtained it from the bank.

## RE-CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Yes, I know what the time for a letter between Oakland and Boise is. The ordinary time of sending a letter. A letter leaving Oakland to Boise should arrive here in 48 hours without any trouble, probably less. The train leaves Oakland at 10 o'clock in the morning and you are here the following morning by 4 o'clock, the second morning.

(Witness excused.)

FELIX T. JONES, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is Felix T. Jones, my age 27, my residence Boise City, Idaho, my occupation is attorney. I am at present holding the position of police judge with the City. I am a son of T. J. Jones, and was his former law partner. I

am acquainted with one David Miller. I was present at a conversation in the latter part of November, 1917, at the Idaho National Bank, at which my father and Mr. Miller were present. At the time, they were speaking of the stock, speaking of 65 share of stock, and at that time Mr. Miller made an offer of \$85.00 per share for the stock, which was refused. Mr. Miller made the statement that he had bought other stock at a cheaper price, and that was about the substance of the conversation. His offer was refused. I was in my father's office on or about the 30th of November, 1917, in the afternoon or towards evening. I was up there alone, and my father came in presently with two telegrams, that is it was two messages, two duplicate messages, and requested that I take it over and send it to J. A. Czizek. He told me to take the money out of the safe and send the message to Czizek.

(Witness handed paper marked Plaintiff's Exhibit No. 1.)

WITNESS: That was one of the messages. I can't say whether that is the original or one of the duplicates. It is one of the telegrams. I took it down to the telegraph office and gave it to the operator. I asked him what the charges would be, and he stated that the charge was sixty-five cents. I told him to send the message to J. A. Czizek at Oakland. I prepaid it. The message was stamped, or I think the first one I gave the message to was

/

May Eagan—of that I am not positive—I think I gave the message to May Eagan. Her name is now May Russell. She was the girl behind the desk. And she was the person I gave the message to. I left it with her, prepaid the charges, and left. I then came back to the office. After leaving the telegram there I came back to our office in the Yates Building. At the request of my father, I went to the telegraph office, I believe, on the first of December, which I think was a Saturday, and asked if there was a message there for Jones. She said no, and then I asked her if they had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland.

MR. MORROW: Just a moment. We object to any further testimony from this witness regarding the conversation that he had with the employees of the company, for the reason that there is an attempt apparently in the complaint to lay a basis for an action of deceit. In paragraphs 7 and 8 it is alleged in substance that the present witness, at the request of his father, made several inquiries at the office as to whether the message had been sent, and was informed that the message had been sent, and that the said T. J. Jones relied upon and believed those statements. Now, if those allegations are material for any purpose it would be as laying a foundation for an action on the ground of deceit, and the fundamentals of that action are not alleged, particularly there is no allegation of any intent to

deceive, and there is no allegation that the employe making any representations concerning that telegram can or ought to have known the facts, and there is no showing of any authority by any employe to make representations concerning the delivery of a telegram, unless in case the sender asks for a report of delivery, which was not done in this case. In that event, under the rules of the company, the receiving office would wire back that it was delivered. But if counsel is seeking to put this in for the purpose of showing the essentials of an action for deceit we think his complaint is radically defective, because he hasn't pleaded it on that theory, and he hasn't pleaded either that there was any intent to deceive, or that there was any knowledge of the falsity of any representation that has been made, and I don't think it is necessary to cite authority upon the point that there is no liability for mere innocent misrepresentations.

MR. JOHNSON: If Your Honor please, it goes to the question of the negligence of the company, it seems to me.

THE COURT: No, the negligence is in not delivering the message.

MR. JOHNSON: Well, also in the employes of the company informing him that it had been delivered, so as not to make it necessary, or to show that the plaintiff was not negligent, that is, Mr. Jones, in not communicating further with him.

THE COURT: Well, for that purpose it may go in.

To which ruling defendant was allowed an exception by the Court.

WITNESS: She looked through some papers and files, and said the telegram had been sent. Well, Sunday came in and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked out. I was present at my father's office after that time, when a conversation took place between my father and David Miller with reference to this stock. Miller came up to the office and asked if we had heard from Czizek. I think that was about ten or ten-thirty in the morning, I think about that time. That would be the fourth. And asked if we had heard from Czizek, to which we replied no, and then he stated that he doubted, that he considered, that he thought we were holding the Czizek stock up, in other words, that he thought we had the 65 shares of stock at

that time, and we told him no, and then he questioned us as to whether we had sent the message or not, and that was about all the conversation.

### CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: If Czizek answered the telegram, I suppose Czizek would have sent the telegram to T. J. Jones. I don't remember whether the clerk made any inquiry or any notation upon the telegram.

(Defendant's Exhibit A handed to witness.)

WITNESS: The telegram which I hold in my hand at the present time, I believe, is the one that I gave to the operator, because these letters here, "454 Yates B." and the "408-W", that is not my writing. It is not my father's writing. I can't say in this particular message—I don't remember whether the clerk asked about our telephone number, but it is customary when you take a message there as a rule, that they usually put your address, and put a scroll around it. I don't think it makes any difference whether you ask for an answer or not. I am not a customer in the office to any great extent, but I don't think that makes any difference. Now, as to this conversation that I had at the telegraph office after the telegram had been sent—there was a conversation on a Saturday. The first conversation was on the first, almost twenty-four hours had elapsed. Then the second conversation—

yes, the telegram was sent on the 30th. I went there first on the 30th and then again on the first, which was almost twenty-four hours after I had taken the telegram down and given it to them to be sent to Czizek. Yes, that would be some time Saturday afternoon. The exact wording of the first statement that was made to me was that the message had been sent to Czizek. Yes, that the message had been sent to Czizek. The way the question was worded, there is no question in my mind, the way they put it, that they told me, that they gave me to understand, that Czizek had received the telegram. As near as I can recall the exact language, that was the exact language, that J. A. Czizek of Oakland had received the telegram. That is the exact language as near as I cal recall. Yes, I paid the charge of sixty-five cents.

(Witness excused.)

The Court took a recess until 2 o'clock P. M.

2 P. M. Saturday, February 28, 1920.

By permission of the Court, J. A. Czizek, the plaintiff, was recalled for further examination and testified as follows:

#### DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: Yes, sir, I stated that I am still the owner of the fifty shares of bank stock of the Idaho National Bank referred to in the complaint. Well,

with reference to disposing of the stock after the middle of February, 1918, when I first learned that this telegram had been sent, I heard a great deal about the plan to merge, and the value of the stock to me seemed to be dependent on selling it, and there was at that time—Mr. Miller wasn't here, and I heard it had fallen through, that his merger plan had fallen through, or whatever they had in view. I don't know as to the details of that, but Mr. Jones and I discussed it a great deal, and he seemed to think there was nothing more to be done about that merger and I didn't look for the sale of it in that direction, and I didn't know where there was a market for it. In fact, I didn't attempt to sell it to anyone else at that time. Well, I didn't know anything of its value other than on one or two occasions I asked Mr. Streeter, who was the cashier, what he thought it was worth. I will venture the statement that I asked him two or three times, but he wouldn't fix it. In fact, his statements to me were very discouraging as to its value. Some time following that time I went to the mine, and I received, I think, a notice to attend a meeting, for the purpose of liquidating, (the bank) or something of that kind. I just can't recall what that notice was or how it read, but I didn't pay much attention to it; I was busy, but later I learned that they were liquidating, and it was in the Overland National. After that time I

knew of no market for the stock. I doubt whether there was any.

### CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: No, I don't think I attempted to sell the stock to anyone else after I came back in February. Mr. Miller I don't think was there. I didn't see him until June of that year. I went home, and he telegraphed me at Oakland, and I met him at Salt Lake by appointment on entirely another matter. In fact, the matter pertained to the purchase of mining interests that he had. I came here to Boise with him for the purpose of consummating that deal. I did not make any further attempt to sell the stock. In fact, I have never made any attempt to sell the stock, prior to Mr. Miller, and told Mr. Fletcher prior to his death that I would like to dispose of it when I left Idaho.

### RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: No, I know nothing regarding its value or whether I could have sold it or whether it had any market value. I was rather discouraged on the showing that the books seemed to make, and that Mr. Streeter gave me. I depended on what he told me. Yes, I made some investigations with a view to ascertaining its value. I think I

went to Mr. Streeter once or twice. In fact, I used to discuss these things with him every once in a while.

(Witness excused.)

H. L. STREETER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is H. L. Streeter. I reside in Boise. I was connected with the Idaho National Bank as cashier from October 1st, 1917, until the present time. I am still acting in that capacity, and as such I have charge of the books and records of the bank. I have with me a portion of the individual ledger that will show the balance of David Miller in the bank at the close of business on November 30th, 1917. Mr. Miller's balance in the Idaho National Bank at the close of business on November 30th, 1917, was \$84,003.57. His balance at the close of business on December 1, 1917, was \$33,943.11. His balance at the close of business on Monday, December 3rd, 1917, was \$30,826.50. And his balance in that bank at the close of business on December 4, 1917, was \$30,818.41. I was acquainted with David Miller to a certain extent. He occupied the position of vice president in that bank at that time. Well, yes, he had purchased stock in

the bank prior to that time. He was a stockholder in the bank when I went in. I have the stock ledger here, which would show the stock purchased by Mr. Miller in the bank on various dates, and which would show the date that the certificates were transferred and recorded. The record shows that on May 25, 1917, certificate No. 106 was issued for 10 shares. Yes, these are certificates that were issued to David Miller. June 25, certificate No. 107 for 50 shares. On the same date, certificate No. 108 for 50; 109, for 50; 110, for 25; 111, for 25. On October 25, certificate No. 114, for 265 shares. November 30, certificate No. 119, for 265 shares. December 10, certificate No. 121, for 50 shares. That is the last certificate that was issued to Mr. Miller. These were all in 1917. The total capital of the bank was \$100,000, and the par value was \$100.00. Since the 14th of February, 1918, I don't think there were any transfers of stock in the Idaho National Bank. I don't think there have been any transfers since then. The book doesn't show any that I recall. The Idaho National Bank still has its charter but there is nothing being done but collecting the assets and paying off the liabilities. It is practically in process of liquidation, and I have charge of those affairs. Well, in my judgment, from my knowledge of the affairs of the bank, the value to the stockholders of the stock in the bank at the present time is purely an estimate, but I doubt if there will be anything left for the

stockholders after the liabilities are paid. Well, I should judge that that has been practically the condition of the bank since the middle of February, 1918.

### CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Yes, I said that on the 10th of December, 1917, certificate No. 121 was issued to Mr. Miller for 50 shares. On December 10th, 1917, it shows that certificate No. 109 was cancelled for 50 shares. There is no such certificate that shows the transfer of the 15 shares that stood in the name of T. J. Jones, to Mr. Miller. That is, no certificate issued to Mr. Miller for 15 shares. The record shows that certificates held or issued to T. J. Jones were cancelled on December 6th, 1917. Three certificates of five shares each, Nos. 4, 55 and 62, for five shares each. On December 6, 1917.

The balance in favor of Mr. Miller on the 28th of November, 1917, at the close of business, was \$1245.95. Yes, on the 30th of November there were some considerable deposits to Mr. Miller's credit. The items are as follows: an item of \$294.40; an item of \$130,000.00; an item of \$750.00. On the 1st of December, the deposits there to Mr. Miller's credit were \$164.60; \$440.00; \$20,000.00. And the balance at the close of business on that day, December 1st, was \$33,943.11. At the close of business on the 5th of December, Mr. Miller's account shows an overdraft of \$20,978.76.

The deposits in Mr. Miller's account on the 6th of December, 1917, show \$147.10; \$3,000.00; \$20,000.00, and the balance in his account on the 6th of December at the close of business was \$1,212.77. At the first of that day, he had an overdraft of \$21,787.23, and the balance at the close of business was \$1,212.77. From the 6th to the 10th of December, the maximum balance in his account on any of those days was \$952.69. On February 5th he had a balance of \$1353.41, and on March 1st he had a balance of \$1264.81. Those are the maximum balances during that period.

(Witness excused.)

NELLIE M. WILSON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: My name is Nellie M. Wilson, I reside in Boise, and was formerly an employe of the Idaho National Bank. I was employed in the capacity of stenographer and bookkeeper. I was connected with the bank ten years and eleven months. I was employed at the bank in November, 1917. I was acquainted with David Miller. He was vice president of the bank. I am acquainted with Mr. T. J. Jones. I was in the bank on or about the 30th of November, 1917, after the banking hours, when Mr. Miller and Mr. Jones were there. I was work-

ing on the books one evening when Mr. Jones came back and asked me if I would write a telegram for him and I told him I would, and I got the blank and sat down at the typewriter. I think that Plaintiff's Exhibit No. 1 is one of the telegrams that I typed. It is the same contents.

Q. What did you do with them after you had typed them?

THE COURT: Do you think that is important, to go over that?

MR. JOHNSON: It was merely leading up to some information that Mr. Miller wanted. I don't know that it is very material, any more than to show that Mr. Miller was very anxious to have the telegram go, and that he afterwards asked her if it was sent, etc., to show that he was personally interested.

THE COURT: All right.

WITNESS: Yes, as I remember, Mr. Jones took the telegrams and went out of the bank with them. Yes, after that I had a talk with Mr. Miller with reference to these telegrams. He came in a little later and asked me if Mr. Jones had written a telegram to Mr. Czizek, and if it had been sent.

(Witness excused.)

L. C. FLORA, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

WITNESS: My name is L. C. Flora. At the present time I am local manager of the Boise office of the Western Union. I am acquainted with Mr. Life, in Salt Lake. He occupies the position of district commercial superintendent, and has jurisdiction over this territory at Boise. If a claim as presented to me for damages growing out of the sending of telegrams, if it comes within a certain amount, managers investigate the claims and pay them locally, that is for sums, certain sums. If they are more than that, the facts are gathered locally and turned over to the district commercial superintendent, who has greater authority in the matter of the settlement of them. In amounts of \$25.00 or over, I send them to the district manager in Salt Lake. These are the instructions that I have from the company.

## CROSS EXAMINATION.

By Mr. Morrow:

WITNESS: Mr. G. H. Hackett was my predecessor as local manager. I can't say positively whether his authority with regard to claims was the same as mine or not, because of the fact that the routine in that respect has been changed slightly, and I believe that it is since 1917. They were approximately the same as my instructions. I have been local manager since November 9, 1918. As best I can remember, this change of the rules was

made some time in 1917. It was simply raising the authority, however, for the office. Yes, for the local office. It was previously, I believe, \$10.00. I have been with the Western Union Company about fifteen years.

#### RE-DIRECT EXAMINATION.

By Mr. Johnson:

WITNESS: I know the instructions that I had, which were naturally general, and which covered amounts up to \$10.00 for offices of this size. No, I wasn't here at the time Mr. Hackett was manager. I have no direct knowledge of what his instructions and authority were other than our rules are universal. Of course, as regards specific authority I don't know. Yes, the rules of all of the local managers throughout the country are practically the same.

(Witness excused.)

Plaintiff rests.

Thereupon the following evidence was offered on behalf of defendant:

MR. MORROW: We offer Defendant's Exhibit No. A in evidence, being a telegram identified by two witnesses on cross-examination. There being no objection said telegram was admitted in evidence and is identical in words and figures with the telegram set out in the special findings of fact herein.

Thereupon a certain paper was marked Defendant's Exhibit B and offered in evidence consisting of a copy of the telegraph blank of defendant certified by the Secretary of the Interstate Commerce Commission, and the same was admitted in evidence over Plaintiff's objection. Said Exhibit No. B is identical with the telegraph blank set forth in the special findings of fact herein and with the form of blank introduced in evidence as plaintiff's Exhibit No. 1 and defendant's Exhibit No. 8, except for the certificate which is as follows:

'Interstate Commerce Commission,  
"Washington.

"I, GEORGE B. McGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of form received on February 20, 1917, from the Western Union Telegraph Company and now on file with the Interstate Commerce Commission.

"In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Commission this 12th day of March, A. D., 1919.

(Signed) "GEORGE B. McGINTY,  
(Seal) "Secretary of the Interstate Commerce Commission."

Thereupon a certain paper was marked defendant's Exhibit No. C and the following occurred:

MR. MORROW: We offer in evidence as Defendant's Exhibit No. 3, certified copy, certified by the Secretary of the Interstate Commerce Commission, of certain rules of the company on file with the commission, being rules No. 1, 5, 9, and 29.

This certified copy contains certain other rules also that are in no way material.

MR. JOHNSON: Are those the same rules that are on this telegraph blank?

MR. MOIROW: They are the rules of the company on file.

MR. RICHARDS: That telegraph blank is identical with the one which you introduced.

MR. JOHNSON: Oh, it is?

MR. MORROW: Yes, it is. It was merely offered for that purpose, to show that the blank on which the telegram was sent was identical with the blank on file.

MR. JOHNSON: Let the record show that plaintiff objects to it, on the ground that it is not shown that these rules and regulations were brought to the attention of the plaintiff in this suit, and the plaintiff in the suit was not a party to the contract, and did not file the telegram, and is not bound by the rules.

MR. MORROW: I assume, Your Honor, that the question as to the effect of those rules not having been brought to the plaintiff's attention is one of the matters that will have to be discussed on the final argument. If the Court has any doubt on the matter—

THE COURT: It may go in, subject to the objection.

The Court afterwards overruled the objection and admitted the said rules in evidence.

The portion of said Exhibit No. C offered in evidence is as follows:

Rule 1.

MESSAGES TO BE ON MESSAGE FORMS,  
AND DATED FROM THE PLACE  
WHERE FILED WITH  
THIS COMPANY.

(a) Each message for transmission shall be written upon the form provided by the company for that purpose, or shall be attached to such form by the sender, or his agent, so as to leave the printed heading in full view above the message.

(b) Every message filed for transmission at an office or agency of this company shall show as its point of origin the name of the city or town where such office or agency is located, and shall show the date when it is filed with this company, with the exceptions shown in paragraphs (c), (d) and (e) of this rule.

(c) A message from a point listed in the Tariff Book of this company as a three-star or four-star point, telephoned by the sender to this company's office at the transfer point designated in the Tariff Book, for transmission, shall show as its point of origin the name of the city or town from which it is telephoned. Existing practices governing the acceptance of messages telephoned by the sender from a point where this company has an office or agency, at a time when such office or agency is closed, may be continued in force until otherwise ordered.

(d) A message originating at a point on a connecting telegraph line at which there is no

Western Union office and transferred to the lines of this company at the transfer point designated in the Tariff Book of this company, shall show as its point of origin and as its date the name of the city or town where, and the date when, it was originally filed with the connecting company and need not show the name of the place where or the date when it is filed with this company.

(e) A message originating with another telegraph company at a three-star or four-star point in connection with which a transfer point preceded by the letter Z is shown in the Tariff Book of this company, and transferred to this company at the Z transfer point, shall show as its point of origin the name of the city or town where it was filed with the other telegraph company, preceded by the letter Z, and as its date the date it was filed with the other telegraph company, and need not show the name of the place where or the date when it is filed with this company.

(f) No message received by this company for transmission shall bear a point of origin or date otherwise than in accordance with the foregoing.

NOTE: For instructions governing the forwarding of messages, see Rule 8.

Rule 5.

REQUEST TO REPORT DELIVERY.—SPECIAL DELIVERY.—REPEATED MESSAGES.

(a) If the sender requests a report of delivery the words "Report delivery" will be placed in the check. (See Rules 4 (e); 32 (e).)

(b) A message to be specially delivered beyond the free delivery limits of the terminal office, and for which the delivery charge is not given in the Tariff Book, will be accepted upon

the payment or guarantee of an amount sufficient to cover the message tolls and the probable cost of delivery, and will carry in the check the words, "Deliver and report charges," when they are to be paid by the sender, or the words, "Delivery guaranteed," when they are to be paid by the addressee. (See Rules 4 (e); 35, 37.)

(c) If the sender requests a repetition of his message, the words "Repeat back" will be placed in the check, and an additional charge of one-half of the regular rate on the message will be made. (See Rules 4 (e); 29.)

#### Rule 9.

### NO PROMISE AS TO TRANSMISSION OR DELIVERY.

Do not make any promise respecting the transmission or delivery of a message.

#### Rule 29.

### TRANSMISSION OF REPEATED MESSAGES.

(a) Observe special care in sending or receiving a message requiring repetition and bearing in the check the indication, "Repeat Back."

(b) Repeat back such messages at each stage of transmission from point of origin to destination.

(c) Make careful comparison with the original as the message is repeated back, underlining or checking each word and, if found to be correct, write across the face of the message the words, "Repeated back O. K." followed by the signals of both operators.

### INTERSTATE COMMERCE COMMISSION. Washington.

I, GEORGE B. McGINTY, Secretary of the  
INTERSTATE COMMERCE COMMISSION,

do hereby certify that the attached are true copies of pages 246, 247, 248, and 253, of the Western Union Telegraph Company Tariff Book, 1917, received March 12, 1917, from the Western Union Telegraph Company, and that said tariff book was on November 30, 1917, and is now on file with the Interstate Commerce Commission.

IN WITNESS WHEREOF, I have  
hereunto set my hand and af-  
(SEAL) fixed the Seal of said Commis-  
sion this 11th day of December,  
A. D., 1919.

GEORGE B. MCGINTY,  
*Secretary of the Interstate Com-  
merce Commission.*

L. C. FLORA, heretofore duly sworn, upon being recalled on behalf of defendant, testified as follows:

#### DIRECT EXAMINATION.

By Mr. Morrow:

WITNESS: In the business of defendant company, we have several different classes of messages. They are the repeated, the unrepeatd and the valued messages.

Q. Now state what the method of handling the repeated and unrepeatd telegrams is, in your office.

A. An unrepeatd telegram—

MR. JOHNSON: I would like to simply interpose an objection there, and object to it as incompetent, irrelevant and immaterial, and not binding

upon the plaintiff in this case. It has nothing to do with the issues raised in the pleadings in the case.

The objection was overruled and the witness continued as follows:

An unrepeatd telegram is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic time clock, and hung on the hook provided for that purpose, to take its turn with other telegrams. While a repeated telegram is given the same handling up to the point that it is given directly to the operator for transmission, and not hung on a hook with the average class of unrepeatd messages. A valued telegram is handled likewise. A repeated or valued message is retained with other telegrams and filed away as other telegrams are filed. The handling of it, seeing that it is handled and repeating back of it, is the only material difference in the handling given. It is first, as I have just said, turned over to the operator for transmission. It is transmitted to the distant point or other relay point, and then repeated back for accuracy to the sending or originating office. The notation made on the face of a repeated telegram is "Repeated back, O. K.", by the operator's initials who has handled the message. That is after it has been sent. Prior to sending, the words "Repeat back", are placed on the face of the telegram. To see whether it has been repeated or not,

the sending marks are observed, and the initials by the clerk handling that, to insure that it has been transmitted and properly repeated back.

### CROSS EXAMINATION.

By Mr. Johnson:

WITNESS: The first thing done with an unrepeated message is, it is first counted, initialed by the clerk, that is, his or her initials put on the face of the telegram to identify who has handled it. That is usually placed in the upper right hand corner. The difference between the handling of an unrepeated message and a repeated message, it is counted first, and the two words, "Repeat back", are written immediately after the check. You will note there in the column check. And the two words "Repeat back" follow that naturally. The first thing that is done with either telegram, is to count them. That is the case with both the repeated and the unrepeated. Then the clerk initials and times it. That is the case with both of them up to that point.

Defendant's Exhibit No. A was handed to the witness.

WITNESS: It has an initial there. You will note the initials "M. B.", perhaps, or "M. Z.", whatever they are, anyway. That would indicate the clerk's initials who handled the message. Yes, that it was received by the clerk and initialed by her. The other writing is forty-nine, paid N. L., which

indicates night letter, as is indicated on the left hand corner.

(Witness excused.)

Thereupon the following stipulation was marked Defendant's Exhibit No. A on the second trial and introduced in evidence:

(Title of Court and Cause.)

STIPULATION AS TO THE TESTIMONY OF  
G. H. HACKETT.

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that G. H. Hackett, a witness on behalf of the defendant in said cause, if called and sworn as a witness in this action, would testify as herein set forth. This stipulation is made with the right reserved to the plaintiff herein to object to all of said evidence, or any part thereof, upon any legal ground to be stated at the time of the trial thereof. Subject to said reservation, it is stipulated that said witness would testify as follows:

I was the local manager of the Western Union Telegraph Company at the office in Boise, Idaho, on November 30, 1917, and remained in such position until about the month of October, 1918. I now reside near Los Angeles, California, and have not since been connected in any way with the telegraph company. As such manager I had general supervision of the entire office. In respect to the settlement of claims against the company for damages,

I had no authority to settle or adjust any claims beyond the sum of \$25.00. All claims in excess of that amount were referred to the District Commercial Superintendent of the Western Union Telegraph Company for the division in which Boise is situated. The Superintendent at that time was Mr. U. G. Life, of Salt Lake City.

I had no knowledge of the filing of the message involved in this action, nor of the fact that it had been misplaced or that it failed of transmission, until about the middle of February, 1918. Mr. Czizek and his attorney, Mr. T. J. Jones, called upon me at my office at that time with a copy of the message and claimed that it had never been delivered. I told them I had no knowledge of the message at all but that I would look into the matter and ascertain if any such message had been filed and whether it had been transmitted. Mr. Czizek and Mr. Jones left the office. I then either made search personally or directed search to be made to ascertain if such message had been filed with the company, and found that no such message was in the day's business for November 30th, 1917. All messages filed with the company each day are, at the close of the business for that day, checked over to ascertain whether they have been properly transmitted. This fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it which includes the initials of the operator sending the same and

the time when the same is transmitted. After this check is made, the messages for the particular day are bound together and tied with a string and laid away for future reference. After we failed to find the message in suit among the messages filed with the Company on November 30, 1917, where it should have been found, examination was made of the files of messages for previous days and the Czizek message was found in one of these earlier files. It bore the initials of the clerk, Margaret Brown, who received the message from the sender at the counter, but had no operator's check on the same, indicating that it had been transmitted, and no perforation showing that it had ever been placed upon the operator's hook for transmission. The duties of the clerk who receives the message after endorsing her own initials and the filing time thereon, and the amount of the toll, is to place the message upon the operator's receiving hook for transmission.

(Portion stricken out on motion as shown below).

Repeated messages are handled in the same way by the receiving clerk, that is to say, they are checked in the same manner and placed upon the operator's hook for transmission, but in addition to the other checks the words "REPEATED BACK Two Extra" are stamped or endorsed upon the face of the message, which indicates to the operator that the message is to be handled as a repeated

message. The clerk, Margaret Brown, was a careful, capable and efficient employe.

I have heard read the testimony of Mr. Felix Jones that he inquired of the Western Union office in Boise on one or more occasions after November 30th about the delivery of the message to Mr. Czizek and was informed that it had been delivered, and in respect thereto have only to say that I was not present at any such conference and cannot deny it except to state that we have had no way of knowing when an unrepeatd message has been delivered, and no clerk had any authority to make any such statement, but that the standing instructions given to all clerk in respect to inquiries concerning messages is to state that we assume a message has been delivered, if we do not hear from it to the contrary. As this message was not transmitted, we, of course, would receive no report upon it.

Some time after the letter from Mr. Jones of February 18, 1918, returning the check for 65c had been received by me, I went to Mr. Jones' office and told him I would like to ask him some questions about the Czizek telegram. I must have gone there under directions from the District Commercial Superintendent to ascertain the facts concerning the claim for damages. It was part of my general duty to make a report to the District Commercial Superintendent of the facts concerning all claims, and I remember asking Mr. Jones some questions

about the value of the stock, but I deny that I made any statement that the company would settle the claim or that there was no question about the company's liability, or used any words to that effect. I made no statement as to the amount that Czizek would be entitled to, or that he would be entitled to anything. I had no authority to determine what the company would do with respect to the claim, but it was my duty to report the facts as fully as I could ascertain them. I wrote a letter to Mr. Jones returning the toll paid on this message which letter is an exhibit in this case.

Dated this 17th day of February, 1922.

RICHARD H. JOHNSON,

CAREY H. NIXON,

*Attorneys for Plaintiff.*

RICHARDS & HAGA,

*Attorneys for Defendant.*

Thereupon it was agreed in open court by the attorneys for the respective parties that it was intended to stipulate that the facts stated by he witness should be considered in evidence the same as if the witness were present and testified, and the same agreement was made as to the stipulation as to the testimony of Mrs. Margaret Holland, set forth below.

Mr. Johnson, after making a statement as to his theory of the proper procedure on the new trial herein, made the following objection to the entire stipulation.

I desire to object to the entire testimony of Mr. Hackett on the ground that it is cumulative. There is no reason shown why it could not have been produced on the former trial,—and on the further ground that in view of the decision of the Appellate Court, it is not proper for new or additional evidence to be introduced in this case at this time, but the matter should be determined upon the records as already taken.

THE COURT: I hardly know why they should have directed a new trial. I remember being somewhat in doubt as to what the Court expected of this Court, but suppose you hadn't stipulated waiving a jury, where would we be? It seems to me we would have to try the case *de novo*.

MR. JOHNSON: It looks that way, Your Honor.

THE COURT: So I think I shall have to overrule the objection. If there is any doubt I think it ought to be resolved that way, so as not to make it necessary to have the case come down here again. If I am receiving evidence which should not be received, of course the Appellate Court can rectify the error very easily.

MR. JOHNSON: The next objection, Your Honor, is on page 3, this portion of Mr. Hackett's testimony beginning about ten lines from the top: "I cannot account for the fact that this message was found in one of the old files instead of in the

file of messages for that day, except that the clerk who received the same must, at the time she received this message, have been examining the file of the former day's messages, and the message in suit in this way was inadvertently mis-filed among the messages in the old file and overlooked."

Your Honor, we desire to object to that portion of it and move that it be stricken out on the ground that it is incompetent, irrelevant and immaterial, in that it consists entirely of surmise and conjecture or opinion of the witness and does not state facts of any testimony of any evidential value. In support of that objection—

THE COURT: You need not discuss it. I will hear from the other side.

MR. MORROW: The only point I would suggest is that in connection with the next statement: "This is the only way the message could have escaped the check which was made at the close of business each day and which is made to ascertain if all messages have been properly transmitted." It seems to me that shows what he bases his statement upon and to that extent it is admissible, particularly in view of the decision of the Appellate Court, which stressed at several places the fact that this was a case of utter failure to transmit a telegram, without attempting any explanation or excuse. And the other portion, the previous portion of the testimony shows where it was found, and this is simply

the explanation, with his statement that that is the only possible way it could have been misplaced.

THE COURT: I can't see that it will cut very much figure either way, but you can indulge the conjecture just as well as Mr. Hackett could, in your argument, if he has only stated the facts as to the mode of transacting business and the way of checking, etcetera, you can discuss that; the motion is allowed.

To which ruling defendant was allowed an exception by the Court.

MR. JOHNSON: We desire to object to the next sentence, "This is the only way the message could have escaped the check which was made at the close of business each day, and which is made to ascertain if all messages have been properly transmitted." I object to that upon the same ground, because that shows on its face that it is merely a conclusion; it shows also that it isn't the only conclusion that could be reached from the facts.

THE COURT: The objection is sustained.

To which ruling the defendant was allowed an exception by the Court.

MR. JOHNSON: If Your Honor please, I desire to move to strike out, beginning with the last paragraph on page 3: "I have heard read the testimony of Mr. Felix Jones that he inquired of the Western Union office in Boise on one occasion after November 30th, after the delivery of the message to

Mr. Czizek, and was informed that it had been delivered, and in respect thereto have only to say that I was not present at any such conference and cannot deny it except to state that we have had no way of knowing when an unrepeatd message has been delivered, and no clerk had any authority to make any such statement, but that the standing instructions given to all clerks in respect to inquiries concerning messages is to state that we assume a message has been delivered, if we do not hear from it to the contrary. As this message was not transmitted, we, of course, would receive no report upon it."

Portions of that possibly may be competent, but we object to the first part of it, on page 3, in which he states he was not present at any such conference and cannot deny it, we move that that be stricken out.

THE COURT: That motion is denied.

MR. JOHNSON: Then we move that the remainder of the paragraph be stricken.

THE COURT: Denied.

Thereupon the following stipulation was marked Defendant's Exhibit B on the second trial and introduced in evidence:

(Title of Court and Cause.)

STIPULATION AS TO TESTIMONY OF MRS.  
MARGARET HOLLAND.

IT IS HEREBY STIPULATED by and between

the parties to the above entitled action that Mrs. Margaret Holland, a witness on behalf of the defendant in said cause, if called and sworn as a witness in this action would testify as hereinafter set forth, but this stipulation is made with the right reserved to the plaintiff herein to object to all of said evidence or any part thereof upon any legal ground to be stated at the time of the trial herein. Subject to said reservation it is stipulated that said witness would testify as follows:

My name is Mrs. Margaret Holland, residence, Ontario, Oregon.

My maiden name was Margaret Brown.

I entered the employ of the Western Union Telegraph Company in October, 1917, at Boise, Idaho, as counter clerk.

I was with the Company in November, 1917, as counter clerk. I do not remember anything regarding the nature of the message from T. J. Jones to J. A. Czizek at Oakland, California, nor do I recall the circumstances of its delivery to the Western Union Office.

I was in the office at the time the message was located and know that it was found in a file with back-date business which had been placed in the Company files prior to the date of the Jones message. It was marked with my initials as counter receiving clerk.

(Portion stricken out on motion as shown below.)

I do not know Felix Jones and do not remember having any conversation with him at any time, and in fact I remember no one coming to me at any time concerning the message.

Dated this 17th day of February, 1922.

RICHARD H. JOHNSON,

CAREY H. NIXON,

*Attorneys for Plaintiff.*

RICHARDS & HAGA,

*Attorneys for Defendant.*

MR. JOHNSON: If Your Honor please, I desire to object to this testimony of Mrs. Holland's, the entire testimony, on the same ground as we object to the testimony of Mr. Hackett.

THE COURT: Overruled.

MR. JOHNSON: I desire to object to the following specific part of her testimony, found on page 2, consisting of the following statement: "I can account for this in only one way. I must have been looking up a service message at the time the Czizek message was handed me, and assume that I mislaid the Czizek message with the back day's business." We object to that upon the same ground upon which we objected to a similar statement in Mr. Hackett's statement.

THE COURT: Sustained.

To which last mentioned ruling defendant was allowed an exception by the Court.

MR. MORROW: With the understanding previously announced that in connection with the transcript all exhibits introduced in the former trial are considered in the case, we rest.

Whereupon the defendant through its counsel made the following request in writing for declarations of law:

(Title of Court and Cause.)

REQUEST FOR DECLARATIONS OF LAW.

COMES NOW, the defendant above named and at the conclusions of the evidence in the above cause, and before the close of the trial therein, respectfully requests this honorable Court to make the following declarations of law, to-wit:

1. That upon all the evidence the decision of the Court should be in favor of defendant.

2. That upon all the evidence the defendant has not been shown to be guilty of gross negligence in failing to transmit and deliver the telegraph message involved in this action.

RICHARDS & HAGA,

*Attorneys for Defendant.*

Which request was denied as to each of the requested declarations of law and an exception was allowed to the defendant to such action by the Court.

Whereupon defendant through its counsel made a request in writing for special findings of fact,

which the Court stated would be allowed if the points upon which special findings were desired were indicated by counsel, and such request having been made before judgment, special findings of fact were accordingly entered herein.

The foregoing constitutes in substance all of the evidence, oral and documentary introduced at said trial and all stipulations filed and proceedings had therein and is hereby duly settled and allowed as defendant's Bill of Exceptions.

FRANK S. DIETRICH,

*Judge.*

May 25, 1922.

Endorsed:

Lodged May 8, 1922.

Filed May 25, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

#### PETITION FOR WRIT OF ERROR.

AND NOW COMES Western Union Telegraph Company, a corporation, defendant herein, and says that on the 11th day of March, 1922, this Court entered judgment herein in favor of plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the manifest prejudice of this defendant, all of which ap-

pears more fully and in detail from the assignment of errors filed with this petition.

WHEREFORE, This defendant prays that a writ or error may be allowed to it from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Idaho, Southern Division, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers upon which said judgment was passed, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and this defendant desiring to supersede the execution of such judgment, herewith tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of said writ of error a supersedeas may issue.

Dated at Boise, Idaho, this 17th day of May, 1922.

BEVERLY L. HODGHEAD,  
RICHARDS & HAGA,

*Attorneys for Defendant.*

ORDER ALLOWING WRIT.

AND NOW, To-wit, on the 19th day of May, 1922, it is hereby ordered that the above and foregoing petition for writ of error is hereby granted, and said writ allowed as prayed for, the same to operate as a sepersedeas upon the defendant filing a bond in the sum of Eight Thousand Dollars

(\$8000.00) with sufficient sureties to be conditioned as required by law.

(Signed)

FRANK S. DIETRICH,

*District Judge.*

Endorsed:

Filed May 19, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

### ASSIGNMENT OF ERRORS.

AND NOW COMES The defendant in the above entitled action, Western Union Telegraph Company, by its attorneys, and in connection with its petition for writ of error herein says that there is manifest error in the record, proceedings and judgment herein, and in particular assigns the following errors:

1. That the Court erred in entering judgment in favor of plaintiff and against this defendant for the sum of \$5663.35 and costs.
2. That the special findings of fact made herein by the District Court are insufficient to support the judgment entered.
3. That the Court erred in refusing defendant's request for a declaration of law to the effect that upon all the evidence defendant had not been shown to have been guilty of gross negligence in failing to transmit and deliver the telegraph message involved in this action.

4. That the Court erred in refusing defendant's request for a declaration of law to the effect that upon all the evidence the decision of the Court should be in favor of the defendant.

5. That the Court erred in holding, adjudging and deciding that the defensive provisions indorsed on the telegram as shown by special finding No. V were inapplicable because the telegram was not transmitted at all, or were inapplicable for any reason.

6. That the Court erred in adjudging and deciding that plaintiff was entitled to recover judgment against defendant notwithstanding the finding that the message in question was an unrepeatd telegram sent subject to the provisions on the blank set forth in subdivision 1 of special finding No. V.

7. That the Court erred in adjudging and deciding that plaintiff was entitled to recover from defendant more than the sum of \$50.00, notwithstanding the finding that the telegram was not specially valued but was only valued at \$50.00, and notwithstanding the provisions of the telegraph blank as shown by sub-paragraph 2 of said special finding No. V.

8. That the Court erred in adjudging and deciding that plaintiff was entitled to recover, notwithstanding the fact that as shown by the special findings no claim in writing for damages was made

to defendant within sixty days after filing of the message, or within sixty days after plaintiff learned that it had failed in transmission.

9. That the evidence is insufficient to support the finding that if plaintiff had received the telegram promptly he would have accepted the offer for his bank stock, and could have delivered such stock in time to avail himself of said offer.

10. That the Court erred in adjudging and deciding that plaintiff was damaged in the sum of \$4500.00 with interest thereon from June 18, 1918.

11. That the Court erred in adjudging and deciding in effect that failure to transmit a telegram constitutes gross negligence per se.

12. That the evidence is insufficient to sustain a finding that defendant was guilty of gross negligence in not transmitting and delivering the telegram under the circumstances found in the special findings.

13. That the evidence is insufficient to justify the finding that the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted.

14. That the evidence is insufficient to sustain the finding that on November 30, 1917, and until December 5, 1917, David Miller was ready, able and willing to buy plaintiff's stock in the Idaho National Bank.

15. That the Court erred on the second trial herein in overruling defendant's objection to the testimony of plaintiff that if he had received the telegram in question, he would have sold his bank stock and would have wired a reply accepting the offer contained in the telegram.

16. That the Court erred in striking the testimony of G. H. Hackett as to how he accounted for the misplacing of the telegram.

17. That the Court erred in striking the testimony of Margaret Holland as to how she accounted for the fact that she misplaced the telegram in question.

18. That the Court erred in admitting the evidence of the witness T. J. Jones as to conversations had with one David Miller with reference to the purchase by Miller of plaintiff's stock.

19. That the Court erred in admitting in evidence the testimony of the witness T. J. Jones as to conversations with one G. H. Hackett in relation to the defendant's failure to transmit the telegram involved herein, and the supposed liability of defendant for such failure.

WHEREFORE, The defendant prays that the judgment of the District Court herein be reversed and the Court directed to enter judgment in favor of defendant.

BEVERLY L. HODGHEAD,  
RICHARDS & HAGA,  
*Attorneys for Defendant.*

Service of the above and foregoing assignment of errors and receipt of a copy thereof, is hereby acknowledged this 17th day of May, 1922.

RICHARD H. JOHNSON,

CAREY H. NIXON,

*Attorneys for Plaintiff.*

Endorsed:

Filed May 19, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Western Union Telegraph Company, a New York corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto J. A. Czizek, the above named plaintiff, in the penal sum of Eight Thousand Dollars (\$8000.00) to be paid to the said J. A. Czizek, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 17th day of May, 1922.

The condition of this obligation is such that, whereas the above defendant, Western Union Tele-

graph Company, has petitioned for writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit made and entered in the said United States District Court for the District of Idaho, Southern Division, on the 11th day of March, A. D. 1922.

NOW, THEREFORE, The condition of this obligation is such that if the above named defendant and plaintiff in error shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation shall be void, and otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, The said Western Union Telegraph Company has caused its corporate name to be hereunto subscribed by its attorneys in said suit, and the said United States Fidelity & Guaranty Company, as surety, has caused its corporate name to be hereunto subscribed and its corporate seal affixed by its attorneys in fact thereunto duly authorized by its Board of Directors, the day and year above written.

WESTERN UNION TELEGRAPH COMPANY.

By RICHARDS & HAGA,

*Its Attorneys.*

UNITED STATES FIDELITY & GUARANTY  
COMPANY,By HENRY WHITSON,  
J. J. McCUE,*Its Attorneys in Fact.*

(Corporate Seal)

The foregoing bond is hereby approved to operate as a supersedeas, and all proceedings in the District Court under the judgment appealed from are hereby stayed.

Dated this 19th day of May, 1922.

(Signed)

FRANK S. DIETRICH,

*District Judge.*

Endorsed:

Filed May 19, 1922.

W. D. McREYNOLDS, Clerk.

---

(Title of Court and Cause.)

---

## WRIT OF ERROR.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you, between J. A. CZIZEK, Plaintiff, and WESTERN UNION

TELEGRAPH COMPANY, defendant, a manifest error hath happened to the great damage of the said defendant, Western Union Telegraph Company, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, in said Circuit, on the 18th day of June next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS The Honorable William H. Taft, Chief Justice of the United States, this 19th day of May, A. D. 1922, and of the independence of the United States the one hundred forty-sixth.

W. D. McREYNOLDS,

*Clerk of the United States District.  
Court for the District of Idaho,  
Southern Division.*

The foregoing writ of error is hereby allowed.

FRANK S. DIETRICH,

*District Judge.*

I hereby certify that a copy of the foregoing writ of error was on the 19th day of May, 1922, lodged in the Clerk's office of the said United States District Court for the District of Idaho, Southern Division, for the said plaintiff who is defendant in error under said writ.

W. D. McREYNOLDS,

*Clerk of the United States District  
Court for the District of Idaho,  
Southern Division.*

(Seal)

Endorsed:

Filed May 19, 1922,

W. D. McREYNOLDS, Clerk.

---

CITATION.

THE UNITED STATES OF AMERICA, ss:

To J. A. Czizek:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein Western Union Telegraph Company, a corporation, is

plaintiff in error, and you, J. A. Czizek, defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 19th day of May, A. D. 1922, and of the independence of the United States the one hundred forty-sixth year.

FRANK S. DIETRICH,  
*District Judge.*

ATTEST:

W. D. McREYNOLDS,  
*Clerk.*

(Seal)

Service of the foregoing citation and receipt of a copy thereof admitted this 22nd day of May, 1922.

RICHARD H. JOHNSON,  
CAREY H. NIXON,  
*Attorneys for Defendant in Error.*

Endorsed:

Filed May 22, 1922.

W. D. McREYNOLDS, Clerk.  
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PRAECIPE.

To W. D. McREYNOLDS, Clerk of the above entitled Court:

You will please prepare the record upon the writ of error of defendant and plaintiff in error, Western Union Telegraph Company, taken in the above entitled cause from the judgment made and entered in said cause on the 11th day of March, 1922, such record to consist of the pleadings, documents and papers in such cause, in the following order:

1. Complaint.
2. Answer.
3. Decision of the Court filed February 21, 1922.
4. Special findings of fact.
5. Judgment.
6. Bill of exceptions as hereafter settled and allowed by the Court.
7. All papers filed in connection with writ of error herein, to-wit: Petition for writ of error, assignments of error, order allowing writ of error, bond on writ of error with order approving same, writ of error, citation, and this praecipe, together with your return to the writ and your certificate.

In preparing the above record you will please omit the title to all pleadings except the complaint, inserting in lieu thereof the words, "Title of Court and Cause," followed by the name of the pleading

or instrument. You will also please omit the verification of all pleadings, inserting in lieu thereof whenever the pleading is verified, the words, "Duly verified."

Dated this 24th day of May, 1922.

BEVERLY L. HODGHEAD,  
RICHARDS & HAGA,

*Attorneys for Defendant and  
Plaintiff in Error.*

Service of the above praecipe and receipt of a copy thereof is hereby admitted this 24th day of May, 1922.

RICHARD H. JOHNSON,  
CAREY H. NIXON, by E. G.,  
*Attorneys for Plaintiff and  
Defendant in Error.*

Endorsed:

Filed May 24, 1922,  
W. D. McREYNOLDS, Clerk.  
By Pearl E. Zanger, Deputy.

---

(Title of Court and Cause.)

---

#### CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 138, inclusive, to be full, true and correct copies of the pleadings and proceedings

138      *Western Union Tel. Co., a Corp., vs.*

in the above-entitled cause, and that the same, together constitute the transcript of the record herein, upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$160.15, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 10th day of June, 1922.

W. D. McREYNOLDS,

(Seal)

*Clerk.*

[Endorsed]: Printed Transcript of Record.  
Filed June 13, 1922. F. D. Monekton, Clerk. By  
Paul P. O'Brien, Deputy Clerk.

**No. 3885**

---

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

**WESTERN UNION TELEGRAPH COMPANY,**  
a Corporation,

Plaintiff in Error,

vs.

**J. A. CZIZEK,**

Defendant in Error.

---

**Upon Writ of Error from the United States District**  
**Court for the District of Idaho,**  
**Southern Division.**

---

**PROCEEDINGS HAD IN THE**  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT.**

---



At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Plaintiff in Error.

vs.

J. A. CZIZEK,

Defendant in Error.

**Order of Submission.**

ORDERED above-entitled cause argued by Mr. Beverly L. Hodghead, counsel for the plaintiff in error, and by Mr. Richard H. Johnson, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a supplemental brief within ten (10) days from date.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twelfth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable FRANK H. RUDKIN, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: \* \* \* Western Union Telegraph Company, a Corporation, Plaintiff in Error, vs. J. A. Czizek, Defendant in Error. No. 3885. \* \* \*

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

**Opinion U. S. Circuit Court of Appeals.**

BEVERLY L. HODGHEAD and RICHARDS &  
HAGA, for Plaintiff in Error. FRANCIS R.  
STARK, of Counsel.

RICHARD H. JOHNSON and CAREY H.  
NIXON, for Defendant in Error.

Before GILBERT and HUNT, Circuit Judges, and  
WOLVERTON, District Judge.

WOLVERTON, District Judge:

This is the second appeal. The facts of the case are adequately set forth in the opinion rendered when it was first here, and it is unnecessary to repeat them. Under stipulation of counsel, entered at the trial in the District Court, it was agreed that the testimony taken on the former trial should be considered to have been taken in the present cause, to the same extent as though the witnesses were produced, subject, however, to all legal objections shown by the record on the former trial;

144     *Western Union Tel. Co., a Corp., vs.*

and that, in addition to such testimony, the evidence should be confined to the testimony of G. H. Hackett and Mrs. Margaret Holland, and such evidence upon the value of the stock of the Idaho National Bank as might be produced by either party.

At the request of plaintiff in error, defendant below, the Court made certain findings of fact and of law, which are in the record and will receive consideration later.

Since the Congress has accorded to the Interstate Commerce Commission administrative control of the regulation of rates to be charged by telegraph companies in prosecuting their business in sending and receiving messages, etc., for remuneration, it has become an established principle of law that, by reason of the telegraph companies' authority to establish reasonable rates, they likewise possess the primary authority to provide rates for unrepeated messages, and the right to fix a reasonable limitation of responsibility where such rates are charged. *Postal Tel.-Cable Co. vs. Warren-Godwin Co.*, 251 U. S. 27.

So it is that the sender of an unrepeated message at the lower rate cannot escape the attendant limitation of liability. *Western Union Tel. Co. vs. Esteve Bros. & Co.*, 256 U. S. 566.

It is now strenuously urged that the principle is applicable here, and, being so applicable, is preclusive of plaintiff's recovery. The very question, however, was determined to the contrary on the former appeal, and it was held that the present

case was not controlled thereby, for reasons then stated. See *Czizek vs. Western Union Telegraph Co.*, 272 Fed. 223. That holding has now become what is termed the law of the case. It is controlling upon this appeal, and was controlling with the trial court. This doctrine has been so many times affirmed and reaffirmed that it is scarcely subject to controversy.

"It has been settled by the decisions of this court," says the Supreme Court in *Roberts vs. Cooper*, 20 How. 467, 481, "that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation."

So the Court of Appeals, Eighth Circuit, in *Burns vs. Cooper*, 153 Fed. 148, 151, says:

"As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and every question which might have been then

raised in opposition to the decision, *res judicata* between the parties to it as respects the claim or cause of action there litigated."

To the same effect, see *Messinger vs. Anderson*, from the Sixth Circuit, 171 Fed. 785, where Lurton, Circuit Judge, says:

"No other rule is conceivable having regard to the necessity of putting an end to litigation."

See also, from this circuit, *Mutual Life Ins. Co. vs. Hill*, 118 Fed. 708; *Olsen vs. North Pacific Lumber Co.*, 119 Fed. 77, 79; *Montana Mining Co. vs. St. Louis Min. & Mill Co.*, 147 Fed. 897; *National Bank of Commerce vs. United States*, 224 Fed. 679; *Bodkin vs. Edwards*, 265 Fed. 621, 622.

True, the expression "the law of the case" does not signify a limitation of power or of jurisdiction, yet it embodies a wholesome rule, which the courts apply to put an end to litigation, and there exists no persuasive reason why it should not be applied in the present case. Counsel's contention in respect to the point under discussion is, therefore, not well taken.

This Court in the former case applied its ruling to all the limitations indorsed on the message, including the clause limiting the time for presenting claim for damages to sixty days, and rendered them of no avail under the evidence attending the neglect in transmitting the message; it being considered that the Telegraph Company was guilty of gross negligence. These matters, for like reasons, are not again open for controversy, unless the additional testimony of Hackett and Holland renders them so. Of this later.

The plaintiff in error is likewise precluded from now insisting that the District Court erred in admitting certain testimony relating to whether defendant in error would have accepted the price offered for the stock had the telegram reached him in ordinary course. The alleged error is based upon objections and exceptions which were taken and saved at the former trial, and were available for controversy on the prior appeal.

As to the testimony of Hackett and Holland, as it is stipulated it would be if they were called, Hackett relates that he was local manager of the Western Union at the time; that he had no knowledge of the filing of the message; that all messages filed are at the close of business each day checked over to ascertain whether they have been properly transmitted; that this fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it, which include the initials of such operator and the time of transmission; that, after this check is made, the messages for the particular day are bound together and tied with a string, and laid away for future reference; that he found the missing message in the files of a previous day, and it bore the initials of the clerk who received it from the sender at the counter, but had no operator's check indicating that it had been transmitted, and no perforation showing that it had ever been placed on the operator's hook; that the duty of the clerk who received the message, after endorsing her initials and the filing time thereon, and the amount of the

toll, was to place the message upon the operator's hook for transmission.

Mrs. Holland (formerly Brown), who was the clerk at the counter, does not remember anything regarding the nature of the message, nor does she recall the circumstances of its delivery at the Western Union office, but she supports Hackett's testimony as to the finding of the message.

The twelfth finding of fact of the Court conforms to this testimony, but draws the deduction that the message was inadvertently put in the file of a former day; and the thirteenth finds that the clerk was a capable and efficient employee, and that the nontransmission of the telegram was due to her inadvertence, and not to any wilful, malicious, or wanton act on her part.

Neither this testimony nor the findings of the court respecting it can be regarded as adequate to overcome this Court's prior holding that the case is one of gross negligence on the part of the plaintiff in error for failure to transmit. Indeed, the findings as drafted contain no specific finding or findings covering pertinent facts that obtained, which were disclosed by the former opinion. We instance only the inquiries of Jones, Jr., made the next day and the day following, at the Western Union office, touching whether the message had been sent, when he was informed by the clerk at the counter, on the first day that it had been sent, and on the next that Czizek had received it.

The fourteenth finding is but a conclusion of law, and is not controlling as a finding of fact.

As we understand the record, the learned trial Judge announced his decision after the conclusion of the trial, holding that plaintiff was entitled to recover, which is the equivalent of a general verdict for the plaintiff. The formal findings were made at the request of the defendant. Nevertheless, viewed in the light of the previous opinion of this Court, they are sufficient to support the judgment.

Special reference is made in the brief of plaintiff in error, under the heading "Specifications of Error," to findings X, XV and XVIII, whereby it is contended that there is no competent evidence in the record to support these findings. From a careful reading of the evidence, it is obvious that the contention is not sustained.

Affirmed.

[Endorsed]: Opinion. Filed February 12, 1923.  
F. D. Monekton, Clerk. By Paul P. O'Brien,  
Deputy Clerk.

---

United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

**Judgment U. S. Circuit Court of Appeals.**

In error to the District Court of the United States for the District of Idaho, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment, Filed and entered February 12, 1923. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

**Stipulation and Order Staying Mandate.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys of record for the above-named parties, that the mandate from the Circuit Court of Appeals to the Court below shall be stayed for thirty days from the date hereof, and an order may be made and entered accordingly by the Court, based on this stipulation, without any further showing.

Dated this 3d day of March, 1923.

BEVERLY L. HODGHEAD,

RICHARDS & HAGA,

Attorneys for Plaintiff in Error.

RICHARD H. JOHNSON,

CAREY H. NIXON,

Attorneys for Defendant in Error.

Dated: San Francisco, Calif., March 9, 1923.

So ordered:

FRANK H. RUDKIN,

United States Circuit Judge.

[Endorsed]: Stipulation and Order Staying Mandate. Filed March 9, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

**Opinion of United States District Court for the District of Idaho, Southern Division, Dietrich D. J., in Case of J. A. Czizek vs. Western Union Telegraph Company, Reversed by Opinion of United States Circuit Court of Appeals Reported in 272 Fed. 223.**

(Title of Court and Cause)

**DECISION.**

April 28, 1920.

**RICHARD H. JOHNSON**, Attorney for Plaintiff.  
**RICHARDS & HAGA**, Attorneys for Defendant.

**DIETRICH**, District Judge:

This suit is brought to recover damages for failure of the defendant to send the following telegram:

“November 30, 1917.

“J. A. Czizek,

“5767 Shafter Avenue,

“Oakland, Calif.

“Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

“T. J. JONES.”

It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the de-

fendant's office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant's Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for \$4,500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been, worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for \$90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the plaintiff's failure to make demand within the period specified on the telegraph blank.

While the point is controverted, I think it also clear that in filing the message the sender was acting for the plaintiff and as his agent. Fairly construed, the complaint so implies, and in his letter or demand of June 18th the plaintiff used this language: "It (the message) was sent to me by my

associate and agent, Mr. T. J. Jones, of Boise, Idaho." This view, it may be added, is also corroborated by other circumstances shown in evidence.

I further find that Miller desired and was able to buy the stock at \$90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of \$90.00, and, had it been delivered, such is the meaning it would have conveyed to him. Besides the contention that no damage can be recovered because at most the message advised the plaintiff only of an offer to buy and there is no way of knowing whether he would or would not have accepted, defendant relies upon three defenses predicated upon the printed conditions endorsed upon the blank form upon which the message was written. This endorsement is as follows:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the original office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the

transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent thereof.

\* \* \* \* \*

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

The message being interstate in its character is subject to Federal law, and these clauses are to be considered in the light of the Interstate Commerce Act, especially as amended by the Act of June 18th, 1910, 36 Stat. 539. *Postal Telegraph Co. vs. Warren-Goodwin L. Co.* (U. S. Supreme Court decision, December 8, 1919). *Western Union Tel. Co. vs.*

156      *Western Union Tel. Co., a Corp., vs.*

Boegli (U. S. Supreme Court decision, January 12, 1920). Certain general principles involved are thought to be illuminated by the following cases: B. & M. R. R. Co. vs. Hooker, 233 U. S. 97. Erie R. R. Co. vs. Stone, 244 U. S. 332. Georgia F. & A. R. Co. vs. Blish, M. Co., 241 U. S. 190. St. Louis I. M. & S. Co. vs. Starbird, 243 U. S. 592. Southern Pac. R. R. Co. vs. Stewart, 248 U. S. 446. Gardner vs. Western Union Tel. Co., 231 Fed. 405. Western Union Tel. Co. vs. Lange, 248 Fed. 656. Gooch vs. Oregon Short Line R. R. Co. (C. C. A., 9th Cir., Decision filed April 5, 1920).

It should be added that the form of the telegraph blank here involved, with the indorsement thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

Under the cases cited it is thought to be clear that stipulations requiring claims for damages to be presented in writing within a specified period are valid and binding when reasonable in their terms and not prohibited by statute or opposed to considerations of public policy. As applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have to be held unreasonable, for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time. But I am inclined to think that the proper view to take of the provision is

that the period of limitation did not begin to run until the plaintiff learned of the default and that he had sixty days thereafter in which to present his claim. I do not find that the precise point has been passed upon, but such seems to be the view implied in *Telegraphic Co. vs. Nichols*, 159 Fed. 643, and *Telegraph Co. vs. Lee*, 192 S. W. 70.

Admittedly the plaintiff had full knowledge on February 14th, but did not make demand until June 18th, a period of a little more than four months. If I have properly interpreted the stipulation, it necessarily follows that the claim is barred.

Were the question one of first impression, I would have difficulty in declining the view that the "repeated telegram" clause is applicable and binding. In terms it covers nondelivery as well as errors in transmission and delays, and, under the evidence, it appears that "repeated" messages are so handled that failure to transmit is less likely to occur than in a case of ordinary messages. But in the *Lange* case (248 Fed. 656), involving facts somewhat different, it is true, the Circuit Court of Appeals for this circuit reached a contrary conclusion, which is deemed to be controlling.

The validity and applicability of the "specially valued" clause are challenged upon two grounds: It is first urged that the charges for telegrams of that class are unreasonable and prohibitive. But such objection is not thought to be available to the plaintiff in an action of this character. *Erie R. R. Co. vs. Stone*, 244 U. S. 332. The other contention

is that the default under consideration constitutes "gross negligence" and that it was incompetent for defendant to stipulate against responsibility therefor. "Gross negligence" is a phrase of vague and flexible import, and, as often used, its meaning is obscure. There is no evidence that the defendant willfully or fraudulently withheld the message from its wires. The failure was doubtless due to a want of care on the part of an office employee, but I do not think it could be held that with the exercise of ordinary care such a default would be impossible. There is nothing unusual on the face of the message—nothing to impress those into whose hands it may have come that it was of special importance; and no suggestion to that effect was made when it was filed. The very purpose of "repeated" or "specially valued" messages, it is to be assumed, is to put employees on their guard and to protect the Company against a default of this character as well as against errors in transmission, and delays. The statute expressly recognizes such classifications, and if the tariff is too high, the remedy, as already indicated, is with the Interstate Commerce Commission. The plaintiff is bound by the conditions he accepted, and he cannot now escape the obligations thereof by claiming that the charges for sending a "valued" telegram would have been excessive.

As already stated, the other defense is that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram. It involves the question whether he would or would not have embraced the

opportunity of which the telegram was intended to advise him, and, if so, whether he could and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good. The inherent difficulty, held to be insuperable in many of the cases, is the impossibility of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened. Would the plaintiff have accepted the offer? Jones, the sender of the message, did, after some consideration of the conditions as he knew them, decide to accept a similar offer for his stock. However, it will be noted that he made no recommendation to the plaintiff, and in the telegram avoided the expression of any very positive opinion as to what was best to do. He said only: "I am inclined to accept for mine." We have no way of knowing whether the plaintiff, who was necessarily ignorant of the precise situation, would have sought to negotiate for a higher price and thus lost the opportunity. Manifestly, to take advantage of the offer it was necessary to act promptly, for there was a crisis in the affairs of the bank and apparently in Miller's financial ability, and counsel for the defendant argue with much plausibility that even had the telegram been sent and delivered plaintiff would not have been able to get the stock to Boise within the required time. Applying the principle recognized in many, and, so far as I am advised, most, of the decided cases, I feel impelled to sustain the defense. Western

160      *Western Union Tel. Co., a Corp., vs.*

Union Tel. Co. vs. Hall, 124 U. S. 444. Richmond  
H. Mills vs. Western Union Tel. Co., 123 Ga. 216,  
51 S. E. 290. Bennett vs. Western Union Tel. Co.,  
129 Ia. 607, 106 N. W. 13. Smith vs. Western  
Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.  
Western Union Tel. Co. vs. Odams Mach. Co., 92  
Miss. 849, 47 So. 412. Cherokee T. Ex. Co. vs.  
Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777.  
Harmon vs. Western Union Tel. Co., 65 S. C. 490,  
43 S. E. 959. Beatty L. Co. vs. Western Union  
Tel. Co., 52 W. Va. 410, 44 S. E. 309. Fisher vs.  
Western Union Tel. Co., 119 Wis. 146, 96 N. W.  
545. Western Union Tel. Co. vs. Watson, 94 Ga.  
202, 21 S. E. 457. Bass vs. Postal Tel. Cab. Co., 127  
Ga. 423, 53 S. E. 465. Wilson vs. Western Union  
Tel. Co., 124 Ga. 131, 52 S. E. 153. Western Union  
Tel. Co. vs. Webb, 48 So. 408. Western Union Tel.  
Co. vs. Ferguson, 54 L. R. A. 846. Hall vs. Western  
Union Tel. Co., 27 L. R. A. (N. S.) 639.

Endorsed: Filed April 29, 1920.

W. D. McREYNOLDS,  
Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 3543.

J. A. CZIZEK,

Plaintiff in Error,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant in Error.

**Opinion U. S. Circuit Court of Appeals in J. A.  
Czizek vs. Western Union Telegraph Company,  
No. 3543 (272 Fed. 223), Referred to in Opinion  
in Case No. 3885.**

Upon Writ of Error from the United States District  
Court for the District of Idaho,  
Southern Division.

Before GILBERT, MORROW and HUNT, Circuit  
Judges:

HUNT, Judge:

Action instituted in the state court for damages because of failure to forward and deliver a telegram dated at Boise, Idaho, November 30, 1917, addressed to J. A. Czizek, 5767 Shafter Avenue, Oakland, Calif., and reading as follows:

"Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

"T. J. JONES."

On petition of the Telegraph Company the case was removed to the Federal Court, and after trial judgment was rendered in favor of the Telegraph Company.

We must first notice a question of jurisdiction presented by plaintiff in error and a motion to strike the bill of exceptions presented by defendant

in error. Removal from the state court to the United States court in the District of Idaho was on the ground that Czizek was a citizen of Idaho and the defendant a New York corporation. Czizek moved to remand to the state court on the ground that he was a citizen and resident of California. In support of his motion affidavits were filed, and defendant filed counter-affidavits. On October 10, 1919, the Court denied the motions. Exception was allowed but no bill of exceptions covering the ruling was prepared or settled during the term of court at which the ruling was made, nor was any order granted for an extension of the time in which to prepare a bill of exceptions. The Telegraph Company by answer denied the allegations of the complaint in part, but admitted the presentation of the message by Jones to the Telegraph Company, receipt and acceptance by the company, and payment of the regular charges. It also admitted that Czizek and Jones were told at the office of the Telegraph Company in Boise that the message never had been sent. Other defenses are based upon the following conditions printed on the back of the telegraph blank:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeatd telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed

between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent thereof.

\* \* \* \* \*

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

Defendants also pleaded that the message was interstate, subject to the rules of the Interstate Commerce Commission.

On June 5, 1920, plaintiff petitioned for a new trial and on June 17, 1920, the Court overruled the motion and granted plaintiff until July 8, 1920, within which to file and serve a proposed bill of exceptions to the rulings, findings and decision of the Court. The bill of exceptions contains all the evidence and was filed and served on July 2, 1920. Defendant moved the District Court to strike the proposed bill of exceptions from the file. The Court denied the motion to strike the entire bill, but struck out the part which related to the motion to remand for the reason that a "bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made." Exception was saved, and the bill of exceptions was settled July 16, 1920. The time for preparing a bill of exceptions to the ruling on the motion to remand expired October 20, 1919, and the term at which such ruling was made expired on February 7, 1920, but as to the other matters, the extensions granted were during the term of the court at which trial was had and the time for preparing bills of exceptions did not expire until July 8th. Under the circumstances, after the Court decided the issue of fact as to residence, it was right in retaining jurisdiction and in striking the portion pertaining to the motion to remand.

Anderson vs. United States, 269 Fed. 65. The Court also had authority to deny the motion to strike the other portions of the bill of exceptions as presented, although they were not prepared and submitted as required by the rules of the court. Humnicutt vs. Peyton, 102 U. S. 333; Russo-Chinese Bank vs. National Bank of Commerce, 187 Fed. 80. The main issues of the case are therefore properly for consideration.

The facts are:

Plaintiff owned fifty shares of stock in the Idaho National Bank worth on their face \$5,000. T. J. Jones owned fifteen shares of the same stock. Miller, a stockholder, wished to buy plaintiff's stock in order to effect a merger of two banks. Plaintiff told Miller that he wished to sell, but no agreement was reached. Plaintiff said he was going away, but on his return would be ready to negotiate. Plaintiff told Jones what Miller said and authorized Jones to negotiate with Miller for him. <sup>Czizek</sup> Miller then went to California and never received the telegram. On December 1st Jones' son inquired at the telegraph office if a message had come for his father and was told there was none. Mr. Jones, Jr., asked the attendant to see if the telegram had been sent. She looked through some files and said it had been sent. On the next day, Jones, Jr., asked again if the message had been sent and was told by the attendant that Czizek had received the telegram. Czizek testified that if he had received the telegram he would have telegraphed acceptance of \$90.00 per share. Jones sold his own fifteen shares at \$90.00

and received the money therefor. Meanwhile the Idaho National Bank went into liquidation and the stock became valueless and remained so. About February 14th, 1918, Czizek returned to Boise and learned that the message to him from Jones had been given to the Telegraph Company on November 30th to forward. Czizek and Jones at once called upon the local manager of the Company who promised investigation. On February 14, 1918, the manager in Boise wrote that the message had failed in transmission, and enclosed a check for the amount paid as toll. On February 18th, Jones returned the check, writing that acceptance might be construed as settlement. The general manager at Boise then went to see Jones and spoke of settlement, upon the basis of the value of the stock and the amount Miller offered. On June 18th plaintiff made formal demand. On June 19th the manager wrote that the letter had been forwarded to the Company for consideration, and inquiring as to the value of the stock. Thereafter Czizek received a letter from the district superintendent of the Telegraph Company dated July 2, 1918, at Salt Lake, acknowledging claim for \$4,500 damages for failure to transmit the message and advising him that the matter had been taken under immediate investigation and that he would be communicated with upon the conclusion of the investigation. The letter also advised Czizek as follows:

“However, more than 60 days having elapsed since date claim message was filed our investigation will be conducted without prejudice to

the situation created by your failure to bring matter to our attention at an earlier date."

After waiting a reasonable length of time and hearing nothing, this action was commenced in June, 1919.

The principal contentions of the plaintiff in error are that there is no provision requiring presentation in writing within any specific time after plaintiff learns of defendant's default, and that both the time and manner of presenting the claim were waived by defendant.

In *Gardner vs. Western Union Teleg. Co.*, 231 Fed. 405, an action was brought by the addressee of a telegram for delay in the delivery of an un-repeated message. The terms of the contract between the telegraph company and the sender of the telegram were the same as in the present case. The Court of Appeals for the Eighth Circuit held that upon principle the plaintiff was bound by the regulation in relation to the presentation of his claim for damages and said:

"Without the contract between Scoville (the sender) and the company, the latter owed the plaintiff no duty and hence there could be no negligence in the absence of the contract. So it plainly appears that plaintiff would have no cause of action except for the contract, because the duty of the company arose from the contract. May the plaintiff charge the company with the duty arising from the contract and at the same time repudiate one of the conditions upon which the duty was assumed? We think not."

That case has the express approval of the Supreme Court in *Postal Telegraph Cable Co. vs. Warren Goodwin Lbr. Co.*, 251 U. S. 27, where the Court held that since the act of Congress of June 18, 1910, 36 U. S. Stat. L. 539, the interstate business of telegraph companies was brought under Federal control and that the provisions of the statute which brought telegraph companies under the act to regulate commerce placed them under the administrative control of the Interstate Commerce Commission, and that they became subject to a uniform national rule and that there was no room for the exercise by the several states of power to regulate by penalizing the negligent failure to deliver promptly an interstate telegram. The same general doctrine was reaffirmed in *Western Union Teleg. Co. vs. Boegli*, 251 U. S. 315. Inasmuch as the record discloses that the telegraph blank on which the message involved was written is on file with the Interstate Commerce Commission, as are the rules governing unrepeatd messages and like matters, questions of the reasonableness of the regulations on the back of the blank are primarily for the Interstate Commerce Commission to determine. *Mitchell Coal and Coke Co. vs. Penn. R. R. Co.*, 230 U. S. 247; *Erie R. R. Co. vs. Stone*, 244 U. S. 332; *Western Union Teleg. Co. vs. Bank of Spencer (Okla.)*, 156 Pac. 1175. In *Cultra et al. vs. Western Union Teleg. Co.*, 44 I. C. C. Rep. 670, approved by the Supreme Court in *Postal T. Co. vs. Goodwin*, *supra*, the Commission held that it was the intention of Congress to

put under the jurisdiction and control of the Commission the rates and practices of interstate telegraph companies, "as well as the rules, regulations, conditions and restrictions affecting their interstate rates." There, the rate which was used by the senders of the telegram was an unrepeatd one to which the Commission held there was attached as a fundamental feature a restricted liability. An error of the telegraph company, caused damage. The telegram was a so-called night letter, charges having been prepaid as for an unrepeatd night letter between the point in Kansas and the city of San Francisco. The conclusion reached was that rules classifying messages are binding upon the telegraph company and upon all those who avail themselves of the services of the telegraph company. Under these recent decisions the Interstate Commerce Commission has control of the regulation of rates and of the practices of the company, and by sanctioning a rule whereby liability of the company is restricted the rule is made binding. To like effect are *Haskell I. & S. Co. vs. Postal Teleg. Cable Co.* (Me.) 96 Atl. 219; *Western Union Teleg. Co. vs. Dant*, 42 App. D. C. 398.

But while the rules just examined and the cases discussing them show the trend of modern decision, we are not ready to hold that the case before us is brought within them. This is not an instance of delay or error in transmission or in delivery such as is contemplated by the rules referred to, but is one where the Telegraph Company, holding itself out as ready and able to perform service for

a valuable consideration fixed by itself and paid to it, undertook to transmit a message and without any excuse at all failed completely to forward the message or to make an effort to fulfill its obligations. Such inattention is not within the terms printed upon the back of the message which as far as pertinent are held to form part of the contract between the sender of the message and the Telegraph Company. Reasonable regulations and terms, the purposes of which are to restrict the liability of the Company for consequences of negligence by reason of the omissions of its employees or the improper or insufficient performance of duty in transmission and delivery, should not be construed as absolving the company from all obligation to perform the duty for which it was created. Public policy, so we think, would not permit of the approval of regulations which would relieve the company from liability for such a total failure to live up to its duty; and in the absence of a controlling decision we must hold that no regulation of the company has released it from liability for its gross negligence in the premises. *Pac. Postal Teleg. Co. vs. Fleischner*, 66 Fed. 899; *Candee vs. W. U. Teleg. Co.*, 34 Wis. 471; *U. S. Teleg. Co. vs. Wenger*, 55 Penn. St. 262.

In accord with what we have said, the clauses with relation to unrepeatd and specially valued messages do not apply. There was no mistake in verbiage and as the message was never sent it was of course impossible to repeat it. As bearing upon the question we cite: *Western U. Tel Co. vs.*

Cook, 61 Fed. 624; Pac. P. Tel. Co. vs. Fleischner, 66 Fed. 899; Swan vs. W. U. Teleg. Co. 129 Fed. 318; Postal Tel. Co. vs. Nichols, 159 Fed. 643.

It is earnestly argued that even if gross negligence is found, the valuation clause in the contract of transmission, hereinbefore quoted, must be held to limit the recovery to fifty dollars. Granting such a restriction is valid and binding where there has been mistake or delay in transmission or delivery or where the message has been transmitted but not delivered whether such errors have been caused by the negligence of the servants of the Company or otherwise, we do not construe non-delivery as the full equivalent of nontransmission. Nondelivery might be because of the carelessness of a boy employed by a receiving office to deliver a transmitted message. If the company used all reasonable care to employ a trustworthy messenger to deliver at a designated place and to a named person, but the messenger should fail to deliver and damages are the result, it may well be that the nondelivery clause as a reasonable one would relieve the company of liability for more than fifty dollars. But we cannot get away from the all important fact that this is a case of nontransmission without excuse and as such is not covered by clauses which are predicated upon the supposition that the company has made reasonable effort to transmit over its wires.

Regarding the case, therefore, as one of gross negligence against the company for failing to perform its undertaking, the liability should be for

such damage as plaintiff in error actually sustained. The meaning and import of the message were perfectly plain on face of the paper; hence, cases where cipher messages were involved are not controlling. Czizek's testimony is positive, and the circumstances sustain it, that he would have sold the stock at the price offered in the message that was not transmitted and the evidence is that he would have been paid the price offered; but a few days afterwards, because of the failure of the bank, the stock became practically worthless. Under the facts, the difference between what he was offered and would have accepted and the value of the stock at about the time he called upon the manager at Boise is the measure of damage. *U. S. Teleg. Co. vs. Wenger*, 55 Penn. St. 262; *Harron vs. W. U. Teleg. Co. (Iowa)*, 57 N. W. 696.

The judgment is reversed and the cause is remanded for a new trial.

[Endorsed]: Opinion. Filed April 4, 1921.  
F. D. Monckton, Clerk. By Paul P. O'Brien,  
Deputy Clerk.

United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 3885.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Plaintiff in Error,

vs.

J. A. CZIZEK,

Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals  
to Record Certified Under Section 3 of Rule 37  
of the Rules of the Supreme Court of the  
United States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-two (172) pages, numbered from and including 1 to and including 172, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, including opinion of Dietrich, D. J., in *J. A. Czizek vs. Western Union Telegraph Company*, and opinion of Circuit Court of Appeals in said case, certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

174      *Western Union Tel. Co., a Corp., vs.*

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of March, A. D. 1923.

[Seal]

F. D. MONCKTON,  
Clerk.

By Paul P. O'Brien,  
Deputy Clerk.

## WRIT OF CERTIORARI AND RETURN—Filed July 30, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Western Union Telegraph Company is plaintiff in error, and J. A. Czizek is defendant in error, No. 3885, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Idaho, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

Upon Writ of Error to the United States District Court for the District of Idaho, Southern Division

## STIPULATION AS TO RETURN TO WRIT OF CERTIORARI

It is hereby Stipulated and Agreed by and between the Attorneys of Record for the respective parties in the above entitled cause, that the Transcript of Record now on file in the Supreme Court of the United States in the Case of Western Union Telegraph Company, a corporation, petitioner, vs. J. A. Czizek, respondent, No. 1012, October Term, 1922, of said Supreme Court, shall stand as the Return of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, to the Writ of Certiorari issued out of said Supreme Court on the 21st day of May, 1922.

Provided, however, and it is expressly agreed that nothing in this stipulation shall be deemed to be a waiver on the part of defendant in error of any objections he may deserve to make to the consideration in the Supreme Court of the Record upon the first writ of error from the Circuit Court of Appeals to the District Court, or any part thereof, contained in said Transcript now on file in the Supreme Court.

Francis R. Stark, Beverly L. Hodghead, Richards & Haga,  
Attorneys for Plaintiff in Error and Petitioner. Richard  
H. Johnson, Carey H. Nixon, Attorneys for Defendant in  
Error and Respondent. Dated June 8th, 1923.

[Endorsed:] Stipulation as to Return to Writ of Certiorari.  
Filed July 9, 1923. F. D. Monckton, Clerk, by Paul P. O'Brien,  
Deputy Clerk.

---

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPU-  
LATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME  
COURT OF THE UNITED STATES

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 9th day of July, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.  
[Seal of United States Circuit Court of Appeals, Ninth Cir-  
cuit.]

## UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

## RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monekton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 9th day of July, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of July, A. D. 1923.

F. D. Monekton, Clerk, By Paul P. O'Brien, Deputy Clerk.  
[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

[File endorsement omitted.]

**FILE COPY**

**No. ~~1012~~ 300**

Office Supreme Court, U.

**FILED**

**APR 19 1923**

WM. R. STANBURY

CLERK

# **In the Supreme Court**

OF THE  
UNITED STATES  
October Term, 1922

✓

**WESTERN UNION TELEGRAPH COMPANY,**  
a corporation,

Petitioner,

vs.

**J. A. CZIZEK,**

Respondent.

**Petition for Writ of Certiorari, Motion,  
Notice, and Brief in Support of Petition.**

FRANCIS R. STARK,  
New York City,

RICHARDS & HAGA,  
Boise, Idaho,

BEVERLY L. HODGHEAD,  
San Francisco, California,  
Attorneys for Petitioner.



## INDEX

---

	Page
Notice of Motion.....	1
Motion for Writ of Certiorari.....	3
Petition for Certiorari.....	5
Statement of the Case.....	7
Questions Involved.....	6
Importance of the Litigation.....	15
Reasons Why the Writ of Certiorari Should Issue.....	14
Brief.....	19
Statement of the Case.....	19
Conflict of Opinion.....	24
The Decision of the Circuit Court of Appeals is in Conflict:	
(1) With the Decision of the Supreme Court of the United States.....	24
(2) With the Decisions of the Supreme Court of the United States and other Courts in respect to the Validity and Application of the Valuation Clause of the Message Regulations.....	36
(3) With the Ruling of the Interstate Commerce Commission, which has been given Jurisdiction to Determine the Reasonableness of Rules and Regu- lations Relating to Interstate Carriers.....	37
(4) With the Decisions of the Supreme Court of the United States in the "Express Company Cases".....	39
Importance of the Case.....	45

## TABLE OF CASES REFERRED TO BY PETITIONER

---

	Page
<i>Adams Express Co. vs. Croninger</i> , 226 U. S. 491.....	39
<i>Bailey vs. Western Union Tel. Co.</i> , 97 Kans. 619.....	37
<i>Chase vs. United States</i> , 256 U. S. 1.....	44
<i>Cultra vs. Western Union Tel. Co.</i> , 44 I. C. C. 670.....	37-46
<i>Dickerson vs. Western Union Tel. Co.</i> , 114 Miss. 115.....	33
<i>Donlon Bros. vs. Southern Pacific Co.</i> , 151 Cal. 763.....	42
<i>Dunhan vs. Western Union Tel. Co.</i> , 85 W. Va. 425.....	38
<i>Frederick vs. Western Union Tel. Co.</i> , 189 Iowa 1338.....	38
<i>Gardner vs. Western Union Tel. Co.</i> , 231 Fed. 405.....	45
<i>Hartness vs. Western Union Tel. Co.</i> , 99 S. E. 759.....	35
<i>Kansas City vs. Carl</i> , 227 U. S. 657.....	39
<i>Klotz vs. Western Union Tel. Co.</i> , 187 Iowa 1355.....	38
<i>Messenger vs. Anderson</i> , 171 Fed. 785.....	43
<i>Messenger vs. Anderson</i> , 225 U. S. 436.....	44-45
<i>Missouri Ry. vs. Harriman</i> , 227 U. S. 657.....	39
<i>Moss vs. Ramey</i> , 239 U. S. 539.....	45
<i>Norris vs. Western Union Tel. Co.</i> , 174 N. C. 92.....	34
<i>Postal Tel. Co. vs. Boteman-Bull Co.</i> , 290 Ill., 155.....	42
<i>Postal Tel. Co. vs. Warren Godwin Lumber Co.</i> , 251 U. S. 27.....	14-29-45
<i>Postal Tel. Co. vs. Dickerson</i> , 254 U. S. 609.....	31-33
<i>Postal Tel. Co. vs. Dickerson</i> , 79 S. 719.....	33
<i>Postal Tel. Co. vs. Dickerson</i> , 248 U. S. 555.....	33
<i>Wells Fargo vs. Neiman-Marcus Co.</i> , 227 U. S. 469.....	39
<i>Western Union Tel. Co. vs. Albert</i> , 124 Miss. 214.....	38
<i>Western Union Tel. Co. vs. Boegli</i> , 251 U. S. 315.....	14-29
<i>Western Union Tel. Co. vs. Esteve Bros. Co.</i> , 256 U. S. 566.....	14-23
<i>Western Union Tel. Co. vs. Hawkins</i> , 73 So. 973.....	35
<i>Western Union Tel. Co. vs. Lee</i> , 192 S. W. 70.....	35
<i>Western Union Tel. Co. vs. Orr</i> (Okla.), 158 Pac. 1139.....	35
<i>Western Union Tel. Co. vs. Schade</i> , 137 Tenn. 214.....	37

# In the Supreme Court

OF THE  
UNITED STATES

OCTOBER TERM, 1922

---

WESTERN UNION TELEGRAPH  
COMPANY, a corporation,

*Petitioner,*

vs.

J. A. CZIZEK,

*Respondent.*

---

**Petition for Writ of Certiorari, Motion,  
Notice, and Brief in Support of Petition.**

---

NOTICE OF MOTION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

*To Respondent in the above entitled action and to  
Richard H. Johnson and Carey H. Nixon, his  
Attorneys:*

Please take notice that on Monday, the 7th day  
of May, 1923, at the opening of the court on that

day, or as soon thereafter as counsel can be heard, petitioner, the Western Union Telegraph Company, a corporation, will, upon its verified petition and copies of the entire record in this cause, submit a motion for a writ of certiorari herein (a copy of which said motion and of the petition for said writ, and brief in support thereof, are herewith delivered to you), to the Supreme Court of the United States in its court room at the City of Washington, District of Columbia.

Dated: San Francisco, April 5th, 1923.

FRANCIS R. STARK,  
RICHARDS & HAGA,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.

# In the Supreme Court

OF THE  
UNITED STATES

OCTOBER TERM, 1922

---

WESTERN UNION TELEGRAPH  
COMPANY, a corporation,  
*Petitioner.*

vs.

J. A. CZIZEK,  
*Respondent.*

---

MOTION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.

Comes now the Western Union Telegraph Company, a corporation, by its counsel, Francis R. Stark, Richards & Haga, and Beverly L. Hodghead, appearing in that behalf, and moves this Honorable Court that it shall, by certiorari or other proper process, directed to the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination that certain cause lately pending in said Circuit Court of Appeals numbered 3885 upon the docket of said Court, in which your

petitioner, the Western Union Telegraph Company, was plaintiff in error, and respondent herein, J. A. Czizek, was the defendant in error; and to that end your petitioner now tenders herewith its petition containing a brief statement of the facts and objects of the motion, and its brief in support thereof, with a certified copy of the entire record in said cause in said Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California, April 5th, 1923.

FRANCIS R. STARK,  
RICHARDS & HAGA,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.

# In the Supreme Court

OF THE  
UNITED STATES  
OCTOBER TERM, 1922

---

WESTERN UNION TELEGRAPH COMPANY, a corporation,	}	<i>Petitioner,</i>
vs.		
J. A. CZIZEK,	}	<i>Respondent.</i>

---

## Petition for Writ of Certiorari

To the United States Circuit Court of Appeals for the Ninth Circuit requiring it to certify to the Supreme Court of the United States for its review and determination the cause entitled "Western Union Telegraph Company, a corporation, Plaintiff in Error, vs. J. A. Czizek, Defendant in Error," lately pending in said Circuit Court of Appeals and numbered 3885 therein.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Western Union Telegraph Company, a corporation, respectfully prays for a writ of

certiorari herein to review the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court of the United States for the District of Idaho, Southern Division, awarding the respondent herein damages in the sum of \$4500, with interest thereon, for the failure to transmit and deliver to respondent a certain telegraphic message from Boise City, Idaho, to the City of Oakland, in the State of California.

#### QUESTIONS INVOLVED.

The cause involves the validity and legal effect of the provisions and stipulations upon the telegraph blanks filed with and approved by the Interstate Commerce Commission and generally in use throughout the United States, upon which the message in question was written, relating

1st, to the liability of telegraph companies for the delays or failure in transmission or delivery or for *non-delivery* of unrepeatd messages;

2nd, to the liability of said company under the provision upon said message blank, agreed upon between the sender of said message and the telegraph company, placing a value upon said message for rate-making purposes beyond which said company should not be liable in case of delays in the transmission or delivery, or in the case of *non-delivery* of said message.

Said decision of said Circuit Court of Appeals

denied to this petitioner the defense to said action provided by the terms and conditions, stipulations, rules, regulations and classifications printed upon said message blank relating to the liability of said petitioner in the transmission and delivery of said message and held that the same did not constitute a defense to the claim for damages alleged to have arisen through the failure to transmit and deliver said message. The said decision is in conflict with the decisions of this Court and with the decisions of the United States Circuit Court of Appeals of other circuits, and with the decisions of the Supreme Courts of various states, and is in conflict with the decision of the Interstate Commerce Commission with respect to the scope of said rules, regulations and classifications of messages.

### STATEMENT OF CASE

The petitioner, Western Union Telegraph Company, is a corporation chartered under the laws of the State of New York, and carries on a general telegraph business throughout all the states of the United States. On the 30th day of November, 1917, the respondent, who was plaintiff in the Court of Appeal, was the owner of fifty shares of stock in the Idaho National Bank, having the par value of \$100 per share. On that date, one T. J. Jones, agent of respondent, delivered to the Western Union Telegraph Company at its office in Boise a telegram addressed to

respondent, J. A. Czizek, at Oakland, California, reading as follows:

"Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Nov. 30, 1917.

J. A. Czizek,  
5767 Shafter Avenue,  
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES,

(+54 Yates B)

(.65c) (408-W)"

The message blank on which said telegram was written contained among other things the following conditions, subject to which said message was accepted for transmission: (See Trans. pp. 43-46.)

*"All telegrams taken by this company are subject to the following terms:*

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM

AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

\* \* \* \* \*

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty

days after the telegram is filed with the Company for transmission.

\* \* \* \* \*

"8. No employee of the Company is authorized to vary the foregoing."

The said telegram was an unrepeatd message of the class known as Night Letter and was valued at not to exceed \$50 in accordance with provisions of the said telegraph blank above set forth, and was delivered to and accepted by defendant for transmission subject to said terms and conditions relating to unrepeatd messages, and no additional sum was paid or agreed to be paid for sending said telegram based upon any value in excess of said sum of \$50. (See Finding VII, Tr. p. 47.)

Prior to the time said telegram was received and accepted for transmission, the rules, rates, charges and classifications of messages established by the defendant, as set out on said blank on which said telegram was written, and the form of said blank had been filed with the Interstate Commerce Commission and the said Commission had acquiesced in and approved the terms, conditions, rates, charges and classifications thereby established. (Finding IX, Tr. p. 47.)

Respondent Czizek never received the telegram and before he learned that such message had been sent to him, the Idaho National Bank went into

liquidation. Afterwards respondent instituted this action against petitioner herein, claiming that if he had received the message in question he would have sold his stock to Miller and would have received the sum of \$4500.

Among other defenses interposed in said action, the defendant therein, the petitioner in this proceeding, pleaded and offered in evidence the written stipulation of the parties the rules, regulations and classifications of messages above set out subject to which the message was received and accepted for transmission and which defined the liability of the telegraph company and prescribed the terms and conditions under which said message was received. This petition for certiorari is based upon the fact that, notwithstanding the decisions of the Supreme Court of the United States recently rendered and the decisions of the Circuit Court of Appeals of other circuits, and the decisions of other Supreme courts, the Circuit Court of Appeals for the Ninth Circuit in this case failed to uphold and give effect to the provisions of said written stipulations and regulations of liability approved by the Interstate Commerce Commission and established by Act of Congress for the purpose of securing the uniformity of rate and uniformity of liability in respect to the transmission of interstate messages.

## HISTORY OF CASE.

The said cause was twice before the Circuit Court of Appeals and twice before the District Court. At the first trial of said cause in the District Court, the Court upheld the provisions upon said message blank relating to unrepeatd messages and to messages valued at the sum of \$50, and held that said clauses of said regulations were controlling in said action. (See opinion of Judge Dietrich, Tr. p. 152.) This decision was reversed by the Circuit Court of Appeals for the Ninth Circuit, the Court holding that the regulations of the Company with relation to unrepeatd messages and valued messages above referred to, and the classifications on file with the Interstate Commerce Commission did not apply to the case of a message which, although it had been received and accepted by the telegraph company for transmission, was nevertheless through negligence not forwarded from the originating office. It was here held that non-transmission from the originating office where the message was filed and accepted without excuse therefor is not embraced within the regulations referred to and that such regulations if applicable, would be against public policy. (See opinion Circuit Court of Appeals, Tr. p. 161, 272 Fed. 223.) The cause was retried before the District Court in Idaho upon the same record, with certain additional testimony as to negligence, and the trial Court, after making the

special findings above referred to (Tr. pp. 41-51), concluded as follows:

"2. It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not transmitted at all, it is accordingly held that plaintiff is entitled to judgment for damages in the sum of Forty-Five Hundred Dollars (\$4,500) with interest thereon from the 18th day of June, 1918, at the rate of 7% per annum, together with costs of suit."

This judgment was affirmed by the Circuit Court of Appeals (See Tr. p. 143). Meanwhile, the Supreme Court of the United States had decided the case of *Western Union Telegraph Co. vs. Esteve Bros.*, 256 U. S. 566, holding that the sender of an unrepeatd message at the lower rate cannot escape the attendant limitation of liability. Notwithstanding this decision, it was held by the Circuit Court of Appeals that its decision on the former appeal (272 Fed. 223) had become the law of the case, and was controlling of this appeal. It is to review this decision and the decision of the Court on the former appeal holding that the rules and regulations and conditions printed on the message blank and filed with the Interstate Commerce Commission did not constitute a defense in the action, that petitioner is seeking this writ of certiorari.

## REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE.

The principal ground upon which the petitioner urges that a writ of certiorari should issue is the conflict of decision between the Circuit Court of Appeals in this case (both on the present appeal and on the former appeal), and the Supreme Court in its decisions in

*Western Union v. Southwick*, 253 U.S. 565,

*Western Union v. Esteve Bros. Co.*, 256 U. S.,  
566, and

*Western Union v. Boegli*, 251 U. S. 315;

*Postal Telegraph Co. v. Dickerson*, 251 U. S.  
609;

*Postal Telegraph Co. v. Warren Godwin Lum-  
ber Co.*, 251 U. S., 27,

with respect to the scope and controlling effect of said rules and regulations concerning the classification of messages, and the rates and extent of liability thereunder.

Your petitioner is advised by counsel that said decision of said Circuit Court of Appeals in regard to the legal effect of said written stipulations, rules and regulations and classifications of messages under which said message was received and accepted for transmission, as above set forth, is not well founded in law; that it is inconsistent with the decisions of this Court, especially the decisions just above referred

to, and is in conflict with the decisions of the United States Circuit Court of Appeals in other circuits, and of other Supreme Courts, which opinions will be reviewed in the brief of petitioner, attached hereto, and that said decision is against law for the reason that notwithstanding said message was filed with said telegraph company, petitioner herein, and accepted for transmission with the direction that it be transmitted as an unrepeatd message, valued at a sum not to exceed \$50, the Court held that the liability of defendant, the petitioner herein, was not determined or controlled by said written rules, regulations, and agreements, and that they did not constitute a defense to said action and that defendant, petitioner herein, was liable for the full amount of said loss, to-wit, the sum of \$4500. Your petitioner is advised and believes that in order to secure uniformity of decision with respect to said rules and regulations under which all telegraph messages are received and accepted for transmission and delivery, and because of the great multitude of messages which are transmitted from day to day throughout the United States and foreign countries, written upon the message blanks containing the same conditions and limitations of liability, and because of the gravity of said question and its importance to the general public, said decision of said Circuit Court of Appeals ought to be reviewed and said questions arising upon the construction and application of said provisions of said message blank be finally

determined by this Court by a writ of certiorari to said Circuit Court of Appeals.

These questions, respectively, were raised and presented to said Circuit Court of Appeals by Assignment of Errors (Tr. pp. 126-129) which petitioner avers were committed by the District Court upon the trial of said cause, and the rendition of said judgment. Your petitioner has no right of appeal or writ of error to this Honorable Court, because the jurisdiction of the District Court in this cause was invoked solely on the ground of the diversity of citizenship. The Circuit Court of Appeals has stayed its mandate in order to allow time for the presentation and determination of this petition.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the questions involved, and its reasons for believing these questions to be of sufficient importance to justify the issuance of the writ of certiorari to said Court of Appeals. Your petitioner also presents and files herewith as an exhibit to this petition a duly certified copy of the entire transcript of the record in said cause including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring said Court to certify and send to this Court on a day cer-

tain to be therein designated, a full and complete transcript of the record and all the proceedings in said Circuit Court of Appeals in that certain action entitled "Western Union Telegraph Company, a corporation, Plaintiff in Error vs. J. A. Czizek, Defendant in Error" No. 3885 upon the records of said Court, to the end that said cause may be reviewed and determined by said Court, as provided by law, and that this Honorable Court may thereupon proceed to correct said errors complained of and that the judgment of said Circuit Court of Appeals may be so modified as to reverse said judgment of said District Court in said cause.

And your petitioner will ever pray.

WESTERN UNION TELEGRAPH  
COMPANY, a corporation,  
Petitioner.

By FRANCIS R. STARK,  
New York City,

RICHARDS & HAGA,  
Boise, Idaho,

BEVERLY L. HODGHEAD,  
San Francisco, California,  
Counsel for Petitioner.

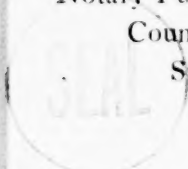
STATE OF CALIFORNIA,  
City and County of San Francisco—ss.

BEVERLY L. HODGHEAD, being duly sworn, says: That he is counsel for the petitioner named in and who subscribed the foregoing petition; that he has read the foregoing petition for writ of certiorari; that the allegations thereof are true, as he verily believes; that the points raised therein in his opinion are meritorious; that said petition is not filed for the purpose of delay; that this affidavit is made by him instead of being made by his client because the matters alleged in said petition relating almost wholly to the proceedings in court are better known to affiant than to his said client.

BEVERLY L. HODGHEAD.

Subscribed and sworn to before me  
this 9th day of April, 1923.

CHARLES E. REITH,  
Notary Public in and for the City and  
County of San Francisco  
State of California



[Title of Court and Cause.]

BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

The message in suit was filed with the Western Union Telegraph Company, petitioner herein, at Boise, Idaho, on the 30th day of November, 1917, to be transmitted to respondent at Oakland, California. It related to the sale of certain bank stock belonging to respondent. Through the negligence of the Company's servants at the originating office, *after the message had been received and accepted*, it failed of transmission and was *not delivered*. Respondent did not learn of the alleged offer until some months afterwards, and meanwhile the bank had gone into liquidation and respondent brought this action against the telegraph company to recover damages claimed to have been suffered by him through the failure to transmit and deliver the telegram. The suit was removed to the Federal Court by reason of the diversity of citizenship of the parties. The District Court at the first trial gave judgment for the defendant, which was reversed on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit (272 Fed. 223). Upon a retrial, the District Court, in deference to the views expressed in that opinion, gave judgment for the plaintiff for the

amount sued for, which judgment was affirmed, the Court holding that its decision upon the former appeal had become the law of the case. It is to review these decisions of the Circuit Court of Appeals that petitioner seeks this writ of certiorari.

The message in suit was written on one of the usual printed blanks furnished by the telegraph company, containing the stipulations, rules, regulations and classifications of messages authorized by the Act of Congress and filed with and approved by the Interstate Commerce Commission. It contained among others, the following conditions.

*"All telegrams taken by this company are subject to the following terms:*

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeatd telegram rate is charged in addition. Unless otherwise indicated on its face, **THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH**, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any

REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery of this telegram, whether caused by negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

\* \* \* \* \*

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

\* \* \* \* \*

"8. No employee of the Company is authorized to vary the foregoing."

The message was filed with the telegraph company at one of its regular offices for receiving messages and was classified by the sender as an *unre-*

*peated night letter, valued at not to exceed fifty dollars.* It was accepted as such for transmission and delivery and *the rate paid was based upon this classification and value.* The decision of the Circuit Court of Appeals denied to petitioner the defense of this limitation of liability, and the telegraph company brings this petition for certiorari contending that said decision is in conflict with the decisions of this Court in several recent cases defining the scope and purpose of the Act of Congress of July 18, 1910 (36 Stat. L. p. 339) and is also in conflict with decisions of other circuits.

#### PURPOSE OF ACT OF CONGRESS

The dominant purpose of the Act of Congress was to take over and subject to a uniform national rule under the administrative control of the Interstate Commerce Commission, the *entire field of interstate telegraphy*. It was intended, as construed by the decisions of this Court, to secure entire equality and uniformity, not only of rates but of *liability* in respect to all messages sent in interstate commerce.

It was held, however, by the Circuit Court of Appeals in its first opinion, which it decided had become the "law of the case," that while the rules and regulations referred to, filed with and approved by the Interstate Commerce Commission, are valid and binding on the users of the telegraph in interstate business, they have no application to a case where the message, although received and accepted for trans-

mission under the classifications above made, fails through the fault of the company's employees at the originating office and is therefore not transmitted nor delivered. Petitioner, on the contrary, contends that its liability in respect to said message became fixed and determined when it was filed and accepted for transmission and classified by sender for rate-making purposes under the provisions of the Act of Congress, and the regulations of the Interstate Commission.

There can be no dispute that the message, when filed and accepted for transmission and classified as to rate and value, is in interstate commerce. The decision of the Circuit Court of Appeals, however, excludes from the operation of the rule of equality and uniformity those messages which failed of transmission and delivery through negligence of the employees at the office where said messages are filed for transmission, and restricts the operation of the Act of Congress under said rules and regulations to but a portion only of interstate messages. The decision of the Circuit Court of Appeals is based on the theory that a *contract* was made between the company and the sender of the message and that there was an entire failure of performance on the part of the telegraph company by its neglect to put the message in course of transmission. Yet this Court has said in the case of

*Western Union Telegraph Co. v. Estee Bros. Co.*, 256 U. S. 566,

that the Act of Congress introduced a new principle into the legal relations of the telegraph companies with their patrons, and that the liability in *all* cases is fixed, *not by contract*, but as a matter of *law*. The language of the Court, found at page 572, is as follows:

“Uniformity demanded that the rate represented the whole duty and *the whole liability* of the company. *It could not be varied by agreement*; still less could it be varied by lack of agreement. The rate became, *not*, as before, a matter of *contract*, by which a legal liability could be modified, but as a *matter of law*, by which the uniform liability was imposed.” (Italics ours.)

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN  
CONFLICT WITH THE DECISIONS OF THE SUPREME  
COURT OF THE UNITED STATES

The decisions of the Circuit Court of Appeals in this case excludes from the operation of the uniform national rule of liability established by the Act all interstate messages which fail of transmission and delivery through the negligence of the company's employees at the *office where the message is filed* for transmission and restricts the operation of the Act of Congress and of such rules and regulations to cases where the negligence occurred at intermediate or terminal offices of the company. It establishes two classes of interstate messages, in one of which the tele-

graph company is still subject to its common-law liability, and in the other the liability is controlled as a matter of law by the Act of Congress. The Supreme Court has said that *all* messages are controlled by the Act of Congress. The *Esteve Bros. Co.* case, *supra*, was decided by this Court *after* the first decision of this case by the Circuit Court of Appeals (272 Fed. 223). The *Esteve* case was not a case where the message failed at the originating office, but the principles, however, settled by that decision with respect to the scope and purposes of the Act of Congress are sufficiently comprehensive to be controlling in any case respecting transmission or delivery, or, as in this case, the *non-delivery* of an interstate telegram. It was there held that the sender of a message, without assent in fact to the provisions limiting liability, is nevertheless bound thereby as a matter of law, because they are a part of the lawfully established rate. Basing the liability, *not upon contract*, but upon the Federal law which secures and exacts a uniform rate and a uniform *liability* in respect to all interstate messages, the Court said, pages 571-2:

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several States. *Thereafter, for all messages*

*sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not, as before, a matter of contract, by which a legal liability could be modified, but as a matter of law, by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."*

The present case comes within the express terms of the regulation. The message was not delivered, and all cases of non-delivery are covered by the stipulations.

The message was in interstate commerce when it was received by the company for transmission. It was an unrepeatd message and paid for as such. "The limitation of liability was an inherent part of the rate" (page 571). It is binding upon all persons until set aside by the Commission.

The Court in the *Esteve* case further said, page 573:

"The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in Section 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve an undue preference or an unjust discrimination,

a rate lawfully established must apply *equally to all* whether there is knowledge of it or not."

The Court said in the quotation given above, "before the Act, the companies had a common-law liability from which they might, or might not extricate themselves, according to views of policy prevailing in the several States." If the decision of the Circuit Court of Appeals in this case be upheld, then as to a portion of the messages in interstate commerce the company is still subject to its common-law liability from which it may or may not extricate itself "according to views of policy prevailing in the several States." It was to prevent these inequalities and discriminations that the Act of Congress was adopted.

Under the rule of the Circuit Court of Appeals the sender of an unrepeatd message carrying the lowest rate, and valued at the lowest sum, and which, under the regulations, was to be transmitted at the sender's risk, may, nevertheless, recover the full amount of his loss. Yet, one who sends a *repeated* message or even a message *insured for its full value* and pays the highest rate can recover no more. In the *Esteve* case, page 575, the Court says these high rates "were open to any one who wished to pay the extra amount *for extra security*." Where one who pays the lowest rate under the *lowest* classification, receives the *same* security as he who pays the *highest* rate, the purpose of the Act to secure equality and uniformity of liability is nullified and destroyed. This Court has said

in the same case that "uniformity demanded that the rate represent the whole duty and the *whole liability of the company*. It could not be varied by agreement." If such liability cannot be varied by agreement, but applies as a matter of law to all cases in interstate commerce, the *Court* cannot establish a different liability and measure damages according to the rules of common law.

We contend that the regulations apply to the present case. A message is in interstate commerce from the time it is received until the time it is delivered, and not merely from the time it is placed on the wire. The Act of Congress took over the regulation of the *entire field of interstate telegraphy*, not a part of it. The Act does not except from its operation the negligence of employes at the originating office.

Many States have enacted statutes imposing penalties upon telegraph companies for failure to forward messages in proper order, or to make prompt delivery of messages. The telegram in question was not forwarded in its proper order and the company thereby may have been, in terms at least, subject to the penalty of the local statute. But these State statutes have now been held to be inoperative as to interstate messages, because the Act of Congress subjected the entire field of interstate telegraphy to Federal control.

The Court said in

*Western Union v. Boegli*, 251 U. S., 315, 64 L. Ed., 281.

"As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the State statute."

The Circuit Court of Appeal in the former decision, said: "This is not an instance of delay or error in transmission or in delivery," which, of course, is true, but it is, however, a case of *non-delivery* which is expressly provided for in the terms of the regulation.

We urge that the former decision is contrary to the rule expressed by the Supreme Court in the case of

*Postal Tel. Co. v. Warren Godwin Lumber Co.*, 251 U. S., 27.

It was there said by this Court, at page 30, as follows:

"We think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws."

If the rule of the former decision in this case is to prevail, then the liability in any case of non-transmission will be made to depend upon the accident of jurisdiction, not upon the Act of Congress.

In determining the liability of the telegraph company with respect to an interstate message, it is not necessary to inquire whether the loss arose from one cause or another, whether from error or delay or non-delivery, or because of negligence at the sending or receiving office, but only if it was an interstate message, in which case it comes within the Federal rule of uniformity and equality and is no longer "subjected to the control of divergent and, it may be conflicting, local laws." This Court, in the *Esteve Bros.* case, we contend, did not simply determine the liability of the telegraph company in the case of error in

transmission, but fixed the Federal rule in respect to interstate messages as a whole and the validity of the regulations approved by the Commission. It did not leave the law unsettled as to losses arising from delay or non-delivery. It holds that the Federal law now fixes the rule for determining the liability of the telegraph company in case of negligence of any of its employees. The Act does not except from its operation the negligence of employees at the office where the message is filed. If it be held that the losses in connection with interstate messages resulting from the negligence of employees at the sending office are not within the Federal rule, then the Act of Congress did not take over the entire field of interstate telegraphy as declared by the Supreme Court. There would be a gap which is still subject to State regulation and common-law liability, and to the control of local laws.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONFLICTS DIRECTLY WITH THE CASE OF POSTAL TELEGRAPH CO. V. DICKERSON, 254 U. S., 609.

Petitioner contends that the decision of the Circuit Court of Appeals in this case conflicts directly with the memorandum opinion and order reversing judgment in

*Postal Telegraph Co. v. Dickerson*, 254 U. S., 609.

The Court of Appeals, in its first decision of the present case, refers to "the absence of a controlling decision" (Tr., p. 170). We respectfully urge that all of the above decisions of the Supreme Court are controlling decisions, inasmuch as they interpret the purpose of the Act of Congress to have been to subject the whole field of interstate telegraphy to one uniform national rule, and to the administrative control of the Interstate Commerce Commission. The Court of Appeals, in referring to the absence of a controlling decision, undoubtedly meant a case in which there was a total failure of transmission. But such a case is found in *Postal Telegraph Co. v. Dickerson*, *supra*. The opinion in that case is a memorandum opinion, but the facts are stated in the decisions of the State court in the same case reported at 114 Miss., 115, which shows, page 117, that the message was filed with the Postal Telegraph Co. which *failed to transmit it*. The facts of this case are also reviewed in *Warren Godwin* case, 116 Miss., 660.

Dickerson sued both the Postal Telegraph and the Western Union Telegraph Company for damage for mental anguish for the *failure to transmit* and make prompt delivery of an interstate telegram from Tupelo, Miss., to Guin, Ala., announcing the death and burial of a relative, *and charging gross negligence*. The message was *filed with the Postal Telegraph Company*, but that company, although it had an office at both points above named, *did not transmit or make*

any effort to transmit the message, but merely delivered it to the Western Union. The trial Court, following the *Showers* case, referred to by Chief Justice White in the *Warren Godwin Lumber Co.* case, 251 U. S., 28, decided for the defendants. On appeal, the Supreme Court of Mississippi receded from its decision in the *Showers* case, and held that the case did not come under the operation of the Federal rule and reversed the decision.

See

*Dickerson v. Western Union*, 114 Miss., 115,  
74 So., 779.

This ruling was reversed or disapproved by the Supreme Court in the *Warren Godwin* case, *supra*; but in the meantime the *Dickerson* case had been retried in Mississippi and judgment given against the *Postal Company* for \$300 damages, and this judgment was affirmed by the Supreme Court of Mississippi in

*Postal Telegraph Co. v. Dickerson*, 79 S., 719.

The Postal Company then petitioned the Supreme Court of the United States for a *certiorari*, which was granted, see

*Postal Telegraph Co. v. Dickerson*, 248 U. S.,  
555,

and the cause on hearing was *reversed*.

*Postal Telegraph Co. v. Dickerson*, 254 U. S.,  
609.

The memorandum decision reciting:

"Per curiam: Reversed upon the authority of *Postal Telegr. & Cable Co. v. Warren Godwin Lumber Co.*, 251 U. S., 27, and *Western Union v. Boegli*, 251 U. S., 315."

It will be observed that it was here held upon the authority of a case involving an *error* in transmission that the same rule applies where there was a *total failure of transmission*, from which it follows that the Federal rule is controlling in respect to all interstate messages.

In the *Dickerson* case the complaint also charged *gross negligence* and wilful misconduct in its *total failure to transmit the message*. In referring to that case, this Court in *Postal Telegraph Co. v. Warren Godwin Lumber Co.*, 251 U. S., 27, speaking through Chief Justice White, said:

"For the sake of brevity, we do not stop to review the cases which perturbed the mind of the Court in the *Dickerson* case as to the correctness of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris v. Western Union Tel. Co.*, 174 N. C., 92, which is among the cases expressly approved in the *Warren Godwin* case and on which the Court in part bases its opinion, was a case of *failure*

to deliver. The Supreme Court in the *Warren Godwin* case did not undertake to specify the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field*, and extended the power of Congress over the rates of telegraph companies for all interstate business and all contracts made by them as to such subject, and has vested the power to determine the reasonableness of the rates, rules, contracts and practices of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

In the case of

*Western Union v. Orr.* (Okla.), 158 Pac., 1139

the action was "for damages for negligently failing to transmit and deliver" a message. The Court held that the regulations above referred to were controlling as to the measure of damage.

See also

*Hartness v. W. U. Tel. Co.*, 99 S. E., 759;

*W. U. Tel. Co. v. Lee*, 192 S. W. 70;

*W. U. Tel. Co. v. Hawkins*, 73 So., 973.

We urge that the case comes within the scope of the Act of Congress and strictly within the terms of the provisions limiting liability in case of *non-delivery* of messages. The Court of Appeal says, near the close of its first Opinion, "Non-delivery might be caused

by the carelessness of a boy employed by a *receiving* (that is terminal) office to deliver a transmitted message," which is true, but it may in the same manner be caused by the carelessness of the boy employed at the *sending office*, both of whom are engaged in interstate commerce. There is no distinction between the two cases except as to the extent of performance of the contract; but this Court has said that the liability is not fixed by contract, but is fixed *as a matter of law* as in the *Esteve Bros.* case where there was no contract at all.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS IN RESPECT TO THE VALUATION CLAUSE OF THE MESSAGE REGULATIONS.

The second regulation, above quoted, provided that the company should not *in any event* be liable for damages for delays or *non-delivery*, *whether caused by the negligence* of its servants or otherwise, beyond the sum of \$50, at which amount this telegram is hereby valued, unless a greater amount be stated and the higher rate be paid. Here the non-delivery was caused by the negligence of the company's servants. The Circuit Court of Appeals held that this clause had no application to interstate messages where gross negligence is present. It is held by the Supreme Court, however, that this clause has no relation whatever to any degree of negligence, but is a value agreed

upon for rate-making purposes and is controlling, even though gross negligence is found. The District Court upon the first trial decided there was no gross negligence (Tr. p. 158). The Court of Appeals construed the total failure to transmit as gross negligence and the District Court on the second trial again found (Finding XIV, Tr., p. 49) :

"That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence unless the failure to transmit a telegram constitutes gross negligence *per se*."

The cases cited in the Opinion of the Court of Appeals in the first decision (Tr., pp. 170-171, and 272 Fed., 223) were decided *before* the Act of Congress was passed.

#### DECISION OF INTERSTATE COMMISSION

Since the approval of this valuation clause of the regulations by the Interstate Commerce Commission, its validity has been upheld by the decision of the Interstate Commerce Commission in

*Cultra v. Western Union Tel. Co.*, 44 I. C. C.,  
670;

*Bailey v. Western Union Tel. Co.*, 97 Kans.,  
619;

*Western Union Tel. Co. v. Schade*, 137 Tenn.  
214.

The above decisions were expressly approved by this Court in *Postal Telegraph Co. v. Warren Godwin Lumber Co.*, 251 U. S., at page 31.

In the *Cultra* case the Commission says:

"The liability of the carrier is limited to the sum of \$50 unless a greater value is declared."

See also the cases of

*Frederick v. Western Union Tel. Co.*, 189 Iowa, 1338;

*Dunham v. Western Union Tel. Co.*, 85 W. Va., 425;

*Klatz v. Western Union Tel. Co.*, 187 Iowa, 1355;

*Western Union v. Albert*, 124 Miss. 214.

In the *Frederick* case there were present the elements of non-delivery and gross negligence. In the Opinion, based upon the recent Federal authorities, the Court said:

"Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending such telegram, but not to exceed fifty dollars."

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS  
IN CONFLICT WITH THE DECISIONS OF THIS COURT  
UPHOLDING SIMILAR VALUATION CLAUSES IN THE  
RAILROAD AND EXPRESS CASES.

The Supreme Court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

*Adams Express Co. v. Croninger*, 226 U. S.,  
491;

*Kansas City v. Carl*, 227 U. S., 639;

*Missouri Ry. v. Harriman*, 227 U. S., 657;

*Wells Fargo v. Neiman-Marcus Co.*, 227 U. S.,  
469.

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates without regard to the place where the negligent act occurred. The Supreme Court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co. v. Croninger*, *supra*, is the first and leading case on the subject, and will be found cited and approved at almost every term of Court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The Court

does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was \$50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the degree of negligence or whether the package was lost at the *originating point or the point of destination*.

We respectfully call the Court's attention to the following paragraphs of the Opinion in *Adams Express Co. v. Croninger*, which we contend are controlling:

"It has, therefore, become an established rule of the common law, as declared by this Court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

\* \* \* \* \*

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the car-

rier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. *The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation,* between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper should be upheld. There is no violation of public policy. *On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.*" (Italics ours.)

In *Wells Fargo v. Neiman-Marcus Co.*, 227 U. S., the action was to recover from the express company the loss of a package of furs "shipped from New York to Dallas, Texas, *and never delivered.*" The agreement as to value in case of loss was substantially the same as in this case. The Court determines that in the case of loss the shipper is held to that declared value. The Court said:

"The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In *Donlon Bros. v. Southern Pacific Co.*, 151 Cal., 763, plaintiffs delivered to the railroad company for shipment two horses, which were valued for rate-making purposes at \$20 each. The horses were injured or killed in transit through the *gross* negligence of the defendant. Plaintiff sued for \$2700, their actual value. The Court held that the plaintiffs were limited to the value stated, and that the contract was not a contract limiting liability, but was a contract dealing primarily with value as a basis upon which freight rates were paid.

We can perceive no difference in respect to this value whether the horses, after they were delivered to the railroad company for shipment, were killed through the negligence of its servants at the shipping point, or at the terminal or any intermediate point.

Respondent contends that the Federal rules as to limitation of liability have no application where there is gross negligence, basing his contention on the fact that in the case of *Postal Tel. Co. v. Bowman-Bull Co.*, 290 Ill., 155, where there was gross negligence, this Court denied certiorari (251 U. S., 562). No opinion was filed, and therefore it does not appear what was the basis of the order. *But it is sufficient to say that in the Bowman and Bull case there was no*

*valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission. Therefore the question as to the validity of such a regulation did not arise.*

The Circuit Court of Appeals did not take the position that the valuation clause involved here is ineffective where gross negligence is present; but, on the contrary, said "granting such restriction is valid . . . we do not construe non-delivery as the full equivalent of non-transmission" (272 Fed., 229, Tr. p. 171), which brings us back to the question discussed above as to whether Congress by the Act of 1910 intended to take over the regulation of the whole field of interstate telegraphy, which obviously includes messages between the States that fail for any reason and at any point.

This Court, in the *Warren Godwin Lumber Co.* case, *supra*, expressly approved the *Cultra* case, the *Bailey* case and the *Schade* case (see page 37, *supra*), all of which upheld the valuation clause here under discussion.

#### THE CIRCUIT COURT OF APPEALS WAS NOT BOUND BY ITS RULING ON THE FORMER APPEAL

The Court of Appeals held that its decision on the former appeal had become the law of the case and was controlling of this appeal, citing some early cases and among others the case of

*Messenger v. Anderson*, 171 Fed., 785.

But this latter case was carried to the Supreme Court and decided in

*Messenger v. Anderson*, 225 U. S., 436.

It is there said by the Supreme Court, speaking through Mr. Justice Holmes, "it was held by the Circuit Court of Appeals that its own previous decision was the law of the case and it was not at liberty to reverse the judgment. In reversing this ruling the Court said:

"In the absence of statute the phrase 'the law of the case' as applied to the effect of previous orders or the later action of the Court rendering them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

The court held that the Court of Appeals should have reversed the judgment and construed the will as did the State Court, if for no other reason, because that construction "was right."

The last expression of this Court on the rule invoked is found in

*Chase v. United States*, 256 U. S., 1,

where the Court said (p. 10):

"The proposition was a relevant and conclusive application when a judgment of a former action is pleaded, but limited application when urged

in the same suit; it expresses a practice only, and useful as such, but not a limitation of power."

*Messenger v. Anderson*, 225 U. S., 436.

See also

*Moss v. Ramey*, 239 U. S. 539.

THE RULES, REGULATIONS AND STIPULATIONS WHICH WE HAVE DISCUSSED ARE BINDING ALIKE UPON A RECEIVER OF A MESSAGE.

*Gardner v. Western Union Tel. Co.*, 231 Fed., 405.

This case was expressly approved by the Supreme Court in

*Postal Tel. Co. v. Warren Godwin Lumber Co.*, 251 U. S., 27. See page 31.

#### THE IMPORTANCE OF THE CASE.

The importance of this case which we deem of sufficient gravity to justify this application, arises from the fact that the validity, scope and application of the provisions of the rules and regulations and provisions limiting liability as to interstate messages are involved, which affect not only the public carrier but the vast number of persons and business concerns who employ the telegraph daily as a means of rapid communication. Petitioner respectfully asks this Court to determine the rule which shall control all

the circuits and all the inferior courts in respect to such liability, "so that," as said by the Interstate Commerce Commission in the *Cultra* case, *supra*,

*Cultra v. Western Union Tel. Co.*,

"the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be considered as attaching to the defendant's error the same degree of responsibility in all the courts."

Respectfully submitted,

FRANCIS R. STARK,  
RICHARDS & HAGA,  
BEVERLY L. HODGHEAD,

Counsel for Petitioner.

#### ADMISSION OF SERVICE

Service of a copy of the foregoing Petition, Brief, Notice, Motion, and Transcript of Record is acknowledged this 13th day of April, 1923.

RICHARD H. JOHNSON and  
CAREY H. NIXON,

Attorneys for Respondents.

**FILE COPY**

**No. 300**

Office Supreme Court

**FILED**

**JAN 26 1923**

**WM. R. STARK**

# **In the Supreme Court**

**OF THE  
UNITED STATES**

**OCTOBER TERM, 1923**

**THE WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,**

**Petitioner,**

**vs.**

**J. A. CZIZEK,**

**Respondent.**

## **BRIEF ON BEHALF OF WESTERN UNION TELEGRAPH COMPANY, PETITIONER.**

✓ FRANCIS R. STARK,  
195 Broadway, New York,  
✓ BEVERLY L. HODGHEAD,  
14 Montgomery St., San Francisco,  
✓ J. H. RICHARDS,  
✓ OLIVER O. HAGA,  
Boise, Idaho,  
✓ JOSEPH L. EGAN,  
195 Broadway, New York,  
Counsel for Petitioner.

## TOPICAL INDEX

---

	Page
Questions Involved.....	3
Statement of the Case.....	4
Specifications of Error.....	9
Brief of the Argument.....	11
Argument.....	16
Liability of the Telegraph Company in the Case of an Unrepeated Message.....	17
The Purpose of the Act of Congress.....	20
Decision of the Court of Appeals Conflicts With the Case of <i>Postal Tel. Co. vs. Dickerson</i> , 254 U. S. 609.....	24
The Valuation Clause in the Message Regulations.....	29
The Valuation Clause in Railroad and Express Cases.....	35
Gross Negligence.....	41
The Sixty-Day Clause for Presenting Claims.....	44
Carrier no Authority to Waive Provision for Presenting Claims.....	46
Testimony as to What Plaintiff Would Have Done if the Message had Been Delivered was not Admissible.....	50
The Circuit Court of Appeals not Bound by Its Ruling on the Former Appeal.....	60

## TABLE OF CASES REFERRED TO BY PETITIONER

	Page
<i>Adams Express Co. vs. Croninger</i> , 226 U. S. 491	13, 35
<i>Act of June 18, 1910</i> , 36 Stat. L. 539-544	11
<i>Alexander vs. Western Union Tel. Co.</i> , 126 Fed. 445	52, 58
<i>American Railway Express Co. vs. Levee</i> , 1 Adv. Opin. 4 (1923)	40
<i>Bailey vs. Western Union Tel. Co.</i> , 97 Kans. 619	13, 31, 34
<i>Beatty Lumber Co. vs. Western Union Tel. Co.</i> , 52 W. Va. 410	15, 51
<i>Chase vs. United States</i> , 256 U. S. 1	61
<i>Chicago &amp; Alton R. R. Co. vs. Kirby</i> , 225 U. S. 155	46
<i>Gooch vs. Oregon Short Line Ry. Co.</i> , 264 Fed. 664	47
<i>Cultra vs. Western Union Tel. Co.</i> , 44 I. C. C. Rep. 670	13, 31, 35
37 Cyc., p. 1760	58
<i>Dickerson vs. Western Union Tel. Co.</i> , 114 Miss. 115	12, 25
<i>Dondon Bros. vs. Southern Pacific Co.</i> , 151 Cal. 763	14, 38
<i>Frederick vs. Western Union Tel. Co.</i> , 189 Iowa 1138, 179 N. W. 934	13, 32
<i>Gardner vs. Western Union Tel. Co.</i> , 145 C. C. A. 399, 16, 34, 45	
<i>Gardner vs. Western Union Tel. Co.</i> , 231 Fed. 405	14
<i>Georgia-Florida etc. Co. vs. Blish Milling Co.</i> , 241 U. S. 190	46
<i>Hall vs. Western Union Tel. Co.</i> , 59 Fla. 275, 51 So. 819	15, 51, 55
<i>Hartness vs. Western Union Tel. Co.</i> , 112 S. C. 11, 99 S. E. 759	12, 28, 35
<i>Jacobs vs. Western Union Tel. Co.</i> , 196 Mo. App. 300	33
<i>Johnson vs. Cadillac</i> , 261 Fed. 878	61
<i>Kansas City Co. vs. Carl</i> , 227 U. S. 639	14, 35
<i>Kiley vs. Western Union Tel. Co.</i> , 39 Hun. 158	15, 51
<i>Klotz vs. Western Union Tel. Co.</i> , 187 Iowa 1355, 175 N. W. 825	13, 32
<i>Larsen vs. Postal Tel. Co.</i> , 150 Ia. 748	49
<i>Messenger vs. Anderson</i> , 171 Fed. 785	60
<i>Messenger vs. Anderson</i> , 225 U. S. 436	60
<i>Missouri Railway Co. vs. Harriman</i> , 227 U. S. 657	14, 36
<i>Moss vs. Ramey</i> , 239 U. S. 539	61
<i>Norris vs. Western Union Tel. Co.</i> , 174 N. C. 92	12, 27

<i>Postal Telegraph Cable Co. vs. Warren Godwin Lbr. Co.</i> , 251 U. S. 27	11, 12, 13, 17, 31
<i>Postal Tel. Co. vs. Nichols</i> , 159 Fed. 43	14, 23, 48
<i>Postal Tel. Co. vs. Boteman-Bull Co.</i> , 200 Ill. 155	39
<i>Postal Tel. Co. vs. Fleischner</i> , 66 Fed. 819	23
<i>Postal Tel. Co. vs. Dickerson</i> , 79 S. 719	25
<i>Postal Tel. Co. vs. Dickerson</i> , 248 U. S. 555	26
<i>Postal Tel. Co. vs. Dickerson</i> , 254 U. S. 609	17, 24, 26
<i>Richmond H. Mills vs. Western Union Tel. Co.</i> , 123 Ga. 216	14, 51
<i>Saxe vs. Penokee Lbr. Co.</i> , 159 N. Y. 371	15, 52, 56
<i>Security Mortgage Co. vs. Western Union</i> , 141 Ark. 79	59
<i>Smith vs. Western Union Tel. Co.</i> , 83 Ky. 104	15, 52, 55
<i>Southern Express Co. vs. Caldwell</i> , 21 Wallace 264	46
<i>Southern Pacific Ry. Co. vs. Stewart</i> , 248 U. S. 446	47
<i>St. Louis etc. Co. vs. Starbird</i> , 243 U. S. 592	47
<i>Swan vs. Western Union Tel. Co.</i> , 129 Fed. 318	23
<i>Wells Fargo Co. vs. Neiman-Marcus Co.</i> , 227 U. S. 469	14, 36, 38
<i>Western Union Tel. Co. vs. Boegli</i> , 251 U. S. 315	12, 17
<i>Western Union vs. Caumissar</i> , 160 Ky. 569	59
<i>Western Union Tel. Co. vs. Cook</i> , 61 Fed. 624	22
<i>Western Union Tel. Co. vs. Estete Bros.</i> , 256 U. S. 566	5, 11, 12, 17, 18, 46
<i>Western Union Tel. Co. vs. Ferguson (Ind.)</i> , 157 Ind. 64, 54 L. R. A. 846	15, 54
<i>Western Union Tel. Co. vs. Hall</i> , 124 U. S. 444	52, 57
<i>Western Union Tel. Co. vs. Hatchkins</i> , 198 Ala. 682, 73 So. 973	12, 28
<i>Western Union Tel. Co. vs. Kaufman</i> , 62 Okla. 160, 162 Pac. 708	34
<i>Western Union Tel. Co. vs. Lee</i> , 174 Ky. 210, 192 S. W. 70	12, 28, 49
<i>Western Union Tel. Co. vs. Orr</i> , 60 Okla. 39, 158 Pac. 1139	12, 27
<i>Western Union Tel. Co. vs. Schade</i> , 137 Tenn. 214	13, 31
<i>Western Union Tel. Co. vs. Watson</i> , 94 Ga. 202	15, 51
<i>White vs. Western Union Tel. Co.</i> , 153 N. Y. App. Div. 684	59

# In the Supreme Court

OF THE  
UNITED STATES

---

OCTOBER TERM, 1923

---

THE WESTERN UNION TELE-  
GRAPH COMPANY, a Corpora-  
tion,

*Petitioner,* No. 300

vs.

J. A. CZIZEK,

*Respondent.*

---

## BRIEF ON BEHALF OF WESTERN UNION TELEGRAPH COMPANY, PETITIONER.

---

The cause comes to this court on certiorari to the Circuit Court of Appeals for the Ninth Circuit. The case was twice tried in the District Court and was twice before the Circuit Court of Appeals.

The action was brought by respondent, Czizek, against the telegraph company for damages for failure

to transmit and deliver to respondent an interstate telegram filed by his agent at Boise, Idaho, relating to the sale of certain shares of stock in the Idaho National Bank. The suit was begun in the State court in Idaho and removed to the Federal court, on the ground of diversity of citizenship. It was first tried in the District Court (without a jury), and judgment rendered for defendant. As the message was interstate, the court held that the provisions on the message blank relating to unrepeatd messages and messages valued at \$50, which regulations had been filed with and approved by the Interstate Commerce Commission, were applicable to and constituted a defense to the action, and gave judgment for the defendant. (See opinion of Judge Dietrich, Tr., p. 152.) On writ of error to the Circuit Court of Appeals this judgment was reversed, the latter court holding that the Act of Congress regulating the field of interstate telegraphy and the rules and regulations fixing liability as to the different classes of messages were not applicable where the telegram failed of transmission and delivery through the negligence of the company's employe at the originating office of the company *after* it had been filed, classified in accordance with the regulations, and accepted for transmission; and further held that if such regulations which had been approved by the Interstate Commerce Commission were applicable, they would be void in such case as against public policy. (Opinion of Circuit

Court of Appeals, Tr., p. 161, and also 272 Fed. 223.) On retrial of the case the District Court, in deference, as was stated, to the views of the Circuit Court of Appeals, gave judgment for plaintiff, which, on second writ of error, was affirmed. (Tr., p. 143, and also 286 Fed. 478.)

Meanwhile the Supreme Court of the United States decided the case of *Western Union Tel. Co. vs. Esteve Bros.*, 256 U. S. 566, holding that the sender of an unrepeatd message at the *lower rate cannot escape the attendant limitation of liability fixed by the regulations adopted pursuant to the Act of Congress*. It was held, however, by the Circuit Court of Appeals in its last opinion that its decision on the former appeal (272 Fed. 223) had become the *law of the case*. A petition was then filed by the telegraph company for certiorari to review this decision and the decision of the same court on the former appeal. The writ of certiorari was granted by this court, and the entire record has been filed herein.

### QUESTIONS INVOLVED

The message in suit was an interstate message filed at the office of the telegraph company at Boise, Idaho, to be transmitted and delivered to respondent at Oakland, California.

The cause, therefore, involves the validity, as well as the application to the facts of the case, of the rules and regulations of the telegraph company for classi-

fication of messages, and prescribing the *rates of toll and the corresponding measure* of liability for each of such classes, pursuant to the Act of Congress. These regulations filed with the Commission relate:

First. To the measure of liability assumed by the company in respect to an *unrepeated message*.

Second. To the measure of liability in the case of a message *valued by the sender for rate-making purposes at a sum not to exceed \$50*.

Third. To the time within which claims for damages must be presented.

These rules and regulations are the same as those which have been before this court in a number of recent cases, which will be cited in proper order.

The cause also involves the question whether there was any competent evidence in the case to show that the respondent suffered any loss.

### STATEMENT OF THE CASE

The facts as shown by the special findings and by the evidence are, briefly, as follows:

On November 30, 1917, defendant in error, who was plaintiff in the court below, was the owner of fifty shares of stock in the Idaho National Bank having a par value of \$100 per share, which at that time was held by the Security Bank of Oakland, Calif., as security for a loan. On that date one T. J. Jones of Boise delivered to the Western Union Telegraph Company at its office in Boise, Idaho, a telegram writ-

ten on one of the company's blanks, addressed to J. A. Czizek, 5767 Shafter avenue, Oakland, Calif., reading as follows:

"Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, Nov. 30, 1917.

J. A. Czizek,  
5767 Shafter Avenue,  
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow. **Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer.**

T. J. JONES,

(454 Yates B)

(.65c) (408-W)"

The message blank on which said telegram was written contained among other things the following conditions, rules and regulations, subject to which said message was accepted for transmission. (See Tr., pp. 43-46.)

*"All telegrams taken by this company are subject to the following terms:*

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated

telegram rate is charged in addition. Unless otherwise indicated on its face, **THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH**, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

"1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any **UNREPEATED** telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any **REPEATED** telegram, beyond fifty times the sum received for sending the same, *unless specially valued*; nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams*.

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of **FIFTY DOLLARS**, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof.

• • • • •

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

\* \* \* \* \*

"8. No employe of the Company is authorized to vary the foregoing."

The telegram in question was an *unrepeated message* of the class known as a night letter, and was *valued at a sum not to exceed \$50*. The rate paid was that required for messages of that class, that is, the *rate prescribed for the transmission of an unrepeated message valued at \$50*. The message was delivered to and accepted by the telegraph company for transmission and delivery, *subject to the above rules and regulations*. (See Findings VI and VII, Tr. p. 47.)

Prior to the time said telegram was received at Boise and accepted for transmission, the above rules, rates, charges and classifications of messages, established pursuant to the Act of Congress, and the form of telegraph blank upon which the same were printed, had been filed with the Interstate Commerce Commission, and "the said Commission had acquiesced in and *approved the provisions therein contained* and the rates, charges and classifications thereby established prior to the filing of said telegram with defendant, thus recognizing the right of the defendant to charge

a higher rate for a greater liability and a *lower rate for a lesser liability*" (Finding IX, Tr. p. 47).

Through the negligence, or, as the court found, through the *inadvertence* of Margaret Brown, "a capable and efficient employe," the message, after it had been received and accepted for transmisson, was placed in the wrong file of messages, which resulted in its non-transmission and non-delivery; "and the non-transmission of the telegram was due to her inadvertence and was not due to any wilful, malicious or wanton act on her part." (Findings XII and XIII, Tr., p. 49.) Before respondent, Czizek, learned that such message had been sent to him, the Idaho National Bank went into liquidation.

The District Court, after making the Special Findings of Fact set out in the Transcript, pages 41-51, filed this conclusion of law:

"It being the view of the Circuit Court of Appeals, as here understood, that the defensive provisions endorsed on the telegram are inapplicable because the telegram was not transmitted at all, it is accordingly held that plaintiff is entitled to judgment." (Tr., p. 51.)

### *SPECIFICATIONS OF ERROR*

The errors assigned by petitioner on this writ are set forth in detail in the record at pages 126-129, inclusive, which are here referred to, but stated generally, they are:

1. The special findings of fact are insufficient to support the judgment.
2. The court erred in holding that the defensive provisions on the telegraph blank were inapplicable where the telegram was never transmitted, and that while such provisions relieved the company from liability for negligence occurring in the course of transmission or at the terminal office of said company, they did not relieve the company from liability for negligence occurring at the sending office before the telegram was actually started over the wires.
3. The court erred in holding and deciding that the *valuation placed on the message for rate-making purposes*, as authorized by the amendment to the Interstate Commerce Act of June 18, 1910, and approved by the Interstate Commerce Commission, was not binding in case of failure to transmit and deliver, and that the binding effect of such *valuation* is dependent or conditioned upon transmission or partial transmission of the telegram.
4. The court erred in holding and deciding that the following provisions of the regulations upon which

the rates charged for the telegram were based, to-wit: (a) the unrepeatd message clause; (b) the valuation clause, and also (c) the clause requiring written claim for damage within sixty days, were inapplicable for any reason.

5. The court erred on the second trial herein in overruling defendant's objection to the testimony of plaintiff that if he had received the telegram in question he would have wired an answer and sold his bank stock.

6. There is no competent evidence sufficient to support the finding that if defendant in error had received the telegram promptly, he would have accepted the offer for his bank stock and could have delivered such stock in time to avail himself of said offer.

7. The evidence is insufficient to sustain the finding that on November 30, 1917, and until December 5, 1917, David Miller was ready, able and willing to buy plaintiff's stock in the Idaho National Bank.

8. The evidence is insufficient to justify the finding that the stock of the Idaho National Bank was worthless in February, 1918, when plaintiff discovered that the telegram had not been transmitted.

## BRIEF OF THE ARGUMENT

The legal duty of a telegraph company and the measure of its liability in relation to interstate messages is determined by the Interstate Commerce Act and the rules and regulations of the company, on file with the Interstate Commerce Commission and approved by it.

*Act of June 18, 1910, 36 Stat. L. 539-544, 4*

*F. S. A. (2d Ed.,) p. 337;*

*Postal Telegraph Cable Co. vs. Warren Godwin Lbr. Co., 251 U. S. 27, 64 L. Ed. 118;*

*Western Union Tel. Co. vs. Esteve Bros., 256 U. S. 566, 65 L. Ed. 1094.*

The classification of interstate telegraph messages into *pecially valued*, repeated and unrepeatd messages, with a different rate and a different measure of liability for each classification, having been made under the authority of the Interstate Commerce Act, and having been approved by the Interstate Commerce Commission, the requirement of uniformity and equality of rates and liability imposed by that Act prevents any deviation from the established rates and measure of liability either by contract or by a judicial award of damages.

*Western Union Tel. Co. vs. Esteve Bros., 256*

*U. S. 566, 65 L. Ed. 1094;*

*Western Union Tel. Co. vs. Boegli*, 251 U. S.  
315, 64 L. Ed. 281;

*Postal Tel. Co. vs. Warren Godwin Lbr. Co.*,  
251 U. S. 27, 64 L. Ed. 118.

The message being in interstate commerce, the un-repeated message clause on which the toll was based limited the liability of the company in case of non-transmission or *non-delivery* to the amount of such toll, whether the message failed at the initial point or elsewhere on the company's line.

*Western Union Tel. Co. vs. Esteve Bros.*,  
*supra*;

*Western Union Tel. Co. vs. Boegli*, *supra*;

*Postal Tel. Co. vs. Warren Godwin Lbr. Co.*,  
*supra*;

*Dickerson vs. Western Union Tel. Co.*, 114  
Miss. 115;

*Norris vs. Western Union Tel. Co.*, 174 N. C.  
92;

*Western Union Tel. Co. vs. Orr*, 60 Okla. 39,  
158 Pac. 1139;

*Hartness vs. Western Union Tel. Co.*, 112 S. C.  
11, 99 S. E. 759;

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210,  
192 S. W. 70;

*Western Union Tel. Co. vs. Hawkins*, 198 Ala.  
682, 73 So. 973.

The measure of the telegraph company's liability under the *valuation clause* of the regulation, based upon the rate paid, became fixed when the message was *deposited in the sending office* and accepted for transmission, and it could not thereafter be varied by showing that the negligence complained of was gross negligence or that it occurred at the initial point.

*Cultra vs. Western Union Tel. Co.*, 44 I. C. C. Rep. 670;

*Bailey vs. Western Union Tel. Co.*, 97 Kans. 619, 156 Pac. 716;

*Western Union Tel. Co. vs. Schade*, 137 Tenn. 214, 192 S. W. 924;

*Postal Tel. & Cable Co. vs. Warren Godwin Lbr. Co.*, 251 U. S. 27, 64 L. Ed. 118;

*Frederick vs. Western Union Tel. Co.*, 189 Iowa 1138, 179 N. W. 934;

*Klotz vs. Western Union Tel. Co.*, 187 Iowa 1355, 175 N. W. 825.

The rule in the railroad and express cases in relation to similar *valuation clauses* relieves the company from liability beyond the value agreed upon as the basis of the rate, regardless of the degree of negligence; and the principle thus established necessarily requires the observance of the same rule in regard to telegraph companies engaged in interstate commerce.

*Adams Express Co. vs. Croninger*, 226 U. S. 491, 57 L. Ed. 314;

*Kansas City Co. vs. Carl*, 227 U. S. 639, 57 L. Ed. 683;

*Missouri Railway Co. vs. Harriman*, 227 U. S. 657, 27 L. Ed. 690;

*Wells Fargo Co. vs. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600;

*Donton Bros. vs. Southern Pacific Co.*, 151 Cal. 763.

The *sixty-day clause* in the regulations relieved the company from all liability, as no claim in writing was presented within sixty days after filing the message, or *within sixty days after discovering that the message failed in transmission and delivery*.

*Gardner vs. Western Union Tel. Co.*, 145 C. C. A. 399, 231 Fed. 405;

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210, 192 S. W. 70;

*Postal Tel. Co. vs. Nichols*, 159 Fed. 43.

Cases cited *supra* in regard to valuation and unrepeat message clauses.

Plaintiff's testimony as to what he would have done if the telegram had been received was inadmissible, and the evidence was insufficient to sustain the finding that he would have accepted the offer and could have delivered his stock in Boise and received the sum of \$4500 in cash in payment therefor.

*Richmond Mills vs. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290;

- Western Union Tel. Co. vs. Watson*, 94 Ga. 202, 21 S. E. 457;  
*Beatty Lbr. Co. vs. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309;  
*Kiley vs. Western Union Tel. Co.*, 39 Hun 158, affirmed 109 N. Y. 231;  
*Western Union Tel. Co. vs. Ferguson*, 157 Ind. 64, 213, 54 L. R. A. 846;  
*Hall vs. Western Union Tel. Co.*, 59 Fla. 275, 51 So. 819, 27 L. R. A. (N. S.) 639;  
*Smith vs. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126;  
*Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371.

## ARGUMENT

The regulations governing the classification of interstate messages in respect to rates and liability established in accordance with the Act of 1910 include the following:

First. That as to unrepeatd messages the company shall not be liable beyond the amount of toll received in cases of (1) mistakes, (2) delays, or (3) *non-delivery*.

Second. That *in any event* the company shall not be liable for mistakes or delays or *non-delivery* beyond the value placed upon the message by the sender as a basis of the rate to be paid which, in this case, was \$50.

Sixth. That the company will not be liable *in any case* unless claim in writing be presented within sixty days from the time the message was filed.

These regulations, adopted under the express authority of the Act of Congress and approved by the Interstate Commerce Commission, have now been held by the Supreme Court in cases hereinafter referred to to be valid. It is held in *Gardner vs. Western Union Tel. Co.*, 231 Fed. 401, approved by this Court, that these regulations are binding alike upon the sender and the *receiver* of an interstate message.

The cases recently before this Court, where the

Act was construed and the above regulations held to be valid, are:

*Western Union Tel. Co. vs. Esteve Bros. Co.*,  
256 U. S. 566;

*Postal Tel. Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27;

*Postal Tel. Co. vs. Dickerson* (mem.), 254 U. S. 609;

*W. U. Tel. Co. vs. Boegli*, 251 U. S. 315.

The court also, in the *Warren Godwin* case, approved the opinion of the Interstate Commerce Commission in

*Cultra vs. Western Union*, 44 I. C. C. 670.

#### LIABILITY OF THE TELEGRAPH COMPANY IN THE CASE OF UNREPEATED MESSAGES

Before the Act of Congress, the telegraph company was subject to a *common-law liability*, which could be modified or not by contract, according to the views of public policy prevailing in the different jurisdictions, among which there was on many questions sharp conflict of authority. The extent of liability depended therefore, in some degree, upon the accident of jurisdiction in each particular case. But by the Act of Congress the rule was made uniform, which this court has said was the dominant purpose, and the liability of the company in respect to different classes of mes-

sages became thus fixed *by law and cannot be modified by agreement of the parties.*

It is said in *Western Union Tel. Co. vs. Esteve Bros.*, 256 U. S. 566, decided after the first decision of the Circuit Court of Appeals in the instant case, that the question there presented for decision was, whether *since* the amendment of June 18, 1910, the sender of a telegraph message is bound as a matter of law by the provision limiting liability *because it is a part of the lawful established rate.*

Answering this question affirmatively, the court said (*italics ours*):

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the Act, the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several States. *Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates.* Uniformity demanded that the rate represent the whole duty and *the whole liability of the company.* **It could not be varied by agreement; still less could it be varied by lack of agreement.** The rate became, not, as before, a matter of contract, by which a legal liability could be modified, but a matter of law, by which a uniform liability was imposed. Assent to the terms

of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."

The regulation, first above quoted, provides among other things that the company will not be liable in case of *non-delivery* of an unrepeatd message beyond the amount received for sending the same. The message in suit was an unrepeatd message and it was *not delivered*. It follows, therefore, that the case comes within the express terms of the regulation fixing the extent of the company's liability in respect to such class of message which is not delivered.

The liability of the company attaches and becomes fixed under the rule when the message is placed in interstate commerce, that is, when it is received by the company, classified by the sender in respect to rate of toll to be paid and the corresponding liability to be assumed, and is thus accepted for transmission and delivery in accordance with such classification. The measure of liability for either mistake, delay or *non-delivery* caused by the negligence of *any* employe is thus fixed by law in accordance with this uniform national rule. As said in the *Estere Bros.* case, the rate became a "matter of law by which *uniform liability* was imposed," and represents "the whole duty and the *whole liability*."

## PURPOSE OF ACT OF CONGRESS

The dominant purpose of the Act of Congress, as held in the above cases, was to take over and subject to a uniform national rule under the administrative control of the Interstate Commerce Commission, the *entire field of interstate telegraphy*. It was intended by the Act, as construed by this court, to secure entire equality and uniformity, not only as to rates, but as to *liability* in respect to all messages sent in interstate commerce.

It was held, however, by the Circuit Court of Appeals in its first opinion, which it later decided had become the "law of the case," that while the rules and regulations referred to, filed with and approved by the Interstate Commerce Commission, are valid and binding on the users of the telegraph in cases of mistakes or delays of messages, they have no application to a case where the message, although received and accepted for transmission under the classifications above made, thereafter fails through the fault of the company's employes at the originating office, and is not transmitted *nor delivered*. Petitioner, on the contrary, contends that its liability in respect to said message became fixed and determined when it was filed and accepted for transmission and classified by sender for rate-making purposes under the provision of the Act of Congress, and the regulations of the Interstate Commission.

There can be no dispute that a message, when filed

and accepted for transmission and classified as to rate and value, is in interstate commerce. The decision of the Circuit Court of Appeals, however, excludes from the operation of the rule of equality and uniformity all those messages which fail of transmission and delivery through negligence of the employes at the office where such messages are filed, and restricts the operation of the Act of Congress under said rules and regulations to but a *portion* only of interstate messages.

The decision of the Circuit Court of Appeals is based on the theory that a *contract* was made between the company and the sender of the message, and that, as there was an entire failure of performance on the part of the company by its neglect to put the message in course of transmission, it cannot enforce the contract. Yet this court has said in the *Esteve* case that the Act of Congress introduced a new principle into the legal relations of the telegraph companies with their patrons, and that the liability in *all* cases is fixed, *not by contract*, but as a matter of *law*, which cannot be varied by the parties.

The case is not taken out of this uniform rule because the negligence resulting in the *non-delivery* of the message was committed by an employe at the sending office. It matters not which employe of the company was at fault. They are all engaged in interstate commerce. Those at the sending office handling such a message are as much engaged in interstate commerce and have as full responsibility for the transmission and

delivery of the message as those at the terminal office of the company. If the message when filed and classified and accepted for transmission is in interstate commerce and yet is still subject to the rule of the common law instead of the Act of Congress, then the Act did not take over the regulation of the entire field of interstate telegraphy as held in the above decisions. Neither the Act itself nor any of the regulations adopted by its authority contain any such restrictive provision or exception to the scope of its application in respect to interstate messages.

Before the Act of Congress, and while the matter of liability of the telegraph company was subject to modification by contract according to the divergent views of public policy in the different jurisdictions, many States held that the above clause of the contract respecting non-delivery had no application and was void as against public policy in case the message, after being transmitted, failed of delivery, through negligence at the *terminal* office. All those cases have been overruled by this court. The lower court in the instant case has held that the provisions have no application where the message failed of transmission and delivery by reason of the negligence of an employe at the office where the message was *filed*. The court cited, in support of its opinion, four Federal cases, viz.:

*Western Union vs. Gask* (1894), 61 Fed. 624;

*Postal Tel. Co. vs. Fleischner* (1895), 66 Fed. 899;

*Swan vs. Western Union* (1904), 129 Fed. 318;

*Postal Tel. Co. vs. Nichols* (1908), 159 Fed. 643.

The above cases, however, were decided before "the Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons, which dominated and modified the principles previously governing them," and subjected interstate commerce by telegraph to a uniform national rule.

We respectfully contend that the distinction drawn by the Circuit Court of Appeals excepting this class of interstate messages from the operation of the Act cannot be maintained. It is based upon the theory that the rights of the parties were defined by contract and that the defensive provisions had no application where there was a total failure of transmission. But the message was in interstate commerce from the time it was filed, and, as said by this Court in the *Estere Bros.* case, the rate became not, as before, a matter of contract, but a matter of law, and represented not only the whole duty, but the *whole liability*.

THE DECISION OF THE COURT OF APPEALS CONFLICTS  
DIRECTLY WITH THE CASE OF POSTAL TEL. CO. VS.  
DICKERSON, 254 U. S. 609.

The Court of Appeals in its first opinion (see 272 Fed., bottom, p. 228) refers to "the absence of a controlling decision." We respectfully urge that all of the decisions of the Supreme Court cited above are controlling decisions inasmuch as they interpret the purpose of the Act of Congress to have been to subject the whole field of interstate telegraphy to one uniform national rule, and to the administrative control of the Interstate Commerce Commission. But the Court of Appeals, in referring to the absence of a controlling decision, undoubtedly meant a case in which there was a total failure of transmission. Such a case is found, however, in

*Postal Tel. Co. vs. Dickerson*, 254 U. S. 609.

The opinion in that case is a memorandum opinion, but the facts are stated in the decision of the State court in the same case reported 114 Miss. 115, which shows, page 117, that the message was filed with the Postal Telegraph Co. which *failed to transmit it*. The facts of this case are also reviewed in *Warren Godwin* case, 116 Miss. 660.

Dickerson sued both the Postal Telegraph and the Western Union Telegraph Company for damages for the *failure to transmit* and make prompt delivery of an interstate telegram from Tupelo, Miss., to Guin,

Ala., announcing the death and burial of a relative, and charging gross negligence. The message was filed with the *Postal Telegraph Company*, but that company, although it had an office at both points above named, did not transmit or make any effort to transmit the message, but merely delivered it to the Western Union. The trial court, following the *Showers* case, referred to by Chief Justice White in the *Warren Godwin Lumber Co.* case, 251 U. S. 28, decided for the defendants. On appeal, the Supreme Court of Mississippi receded from its decision in the *Showers* case, held that the case did not come under the operation of the Federal rule, and reversed the decision.

See

*Dickerson vs. Western Union*, 114 Miss. 115,  
74 So. 779.

This ruling was reversed or disapproved by this court in the *Warren Godwin* case, *supra*; but in the meantime the *Dickerson* case had been retried in Mississippi and judgment given against the *Postal Company* for \$500 damages, and this judgment was affirmed by the Supreme Court of Mississippi in

*Postal Telegraph Co. vs. Dickerson*, 79 So. 719.

The Postal Company then petitioned the Supreme

Court of the United States for a *certiorari*, which was granted, see

*Postal Telegraph Co. vs. Dickerson*, 248 U. S. 555,

and the cause on hearing was *reversed*:

*Postal Telegraph Co. vs. Dickerson*, 254 U. S. 609, ..

the memorandum decision reciting:

"Per curiam: Reversed upon the authority of *Postal Teleg. & Cable Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27, and *Western Union vs. Boegli*, 251 U. S. 315."

It will be observed it was here held, upon the authority of the *Warren Godwin* case, involving an *error* in transmission, that the same rule applies where there was a *total failure of transmission*, from which it follows that the Federal rule is controlling in respect to all interstate messages.

In the *Dickerson* case the complaint also charged *gross negligence* and wilful misconduct in its *total failure to transmit the message*. In referring to that case, this Court in *Postal Telegraph Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27, speaking through Chief Justice White, said:

"For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court in the *Dickerson* case as to the correctness

of its ruling in the *Showers* case (citing cases), but content ourselves with saying that we are of the opinion that the effect so given to them was a mistaken one."

The case of *Norris vs. Western Union Tel. Co.*, 174 N. C. 92, which is among the cases expressly approved in the *Warren Godwin* case, and on which the court in part bases its opinion, was a case of *failure to deliver*. The Supreme Court in the *Warren Godwin* case did not undertake to specify all the particular cases in which the message contracts applied, but in effect held that Congress by the Act of 1910 has occupied the *entire field*, and extended the power of Congress over the rates of telegraph companies for *all interstate business* and contracts made by them as to such subject, and has vested the power to determine the reasonableness of the rates, rules, contracts and practices of such interstate telegraph companies in the first instance in the Interstate Commerce Commission.

In the case of

*Western Union vs. Orr*, 60 Okla. 39, 158 Pac.  
1139,

the action was "for damages for negligently failing to transmit and deliver" a message. The court held that the regulations above referred to were controlling as to the measure of damage.

See, also,

*Hartness vs. W. U. Tel. Co.*, 112 S. C. 11, 99  
S. E. 759;

*W. U. Tel. Co. vs. Lee*, 174 Ky. 210, 192  
S. W. 70;

*W. U. Tel. Co. vs. Hawkins*, 198 Ala. 682, 73  
So. 973.

We urge that the case comes within the scope of the Act of Congress and directly within the terms of the provisions limiting liability in case of *non-delivery* of messages. The Court of Appeals says, near the close of its first opinion (272 Fed., p. 229): "Non-delivery might be caused by the carelessness of a boy employed by a *receiving* (that is, terminal) office to deliver a transmitted message," which is true; *but it may, in the same manner* as in this case, be caused by the inadvertence of a girl employed at the *sending office, both of whom are engaged in interstate commerce*. There is no distinction between the two cases, except as to the extent of performance of what the Circuit Court of Appeals denominated a contract; but this Court has said that the liability is not fixed by contract, but is fixed *as a matter of law*, as in the *Estere Bros. case*, *where there was no contract at all*.

## THE VALUATION CLAUSE IN THE MESSAGE REGULATIONS

The second regulation, above quoted, provides that the company shall not *in any event* be liable for damages for (1) mistakes, or (2) delays in transmission or delivery, or for (3) *non-delivery, whether caused by the negligence* of its servants or otherwise, *beyond the sum of \$50*, at which amount this telegram is valued, unless a greater amount be stated and the higher rate be paid. Here the non-delivery was caused by the negligence of the company's servants. The Circuit Court of Appeals held that this clause had no application to interstate messages where gross negligence is present. It is held by the Supreme Court, however, that this clause has no relation whatever to negligence of any *degree, whether gross or simple*, but is a *value* agreed upon for rate-making purposes and is controlling, even though gross negligence is found. Obviously, the *value* of a thing cannot be changed by the degree of negligence in dealing with or handling it. The District Court upon the first trial decided there *was no gross negligence* (Tr., p. 158). The Court of Appeals, however, construed the total failure to transmit as gross negligence. The District Court on the *second* trial again found (Finding XIV, Tr. p. 49):

"That the failure to transmit and deliver said telegram under the circumstances as hereinbefore found did not constitute gross negligence, unless the failure to transmit a telegram constitutes gross negligence *per se*."

The cases cited by the Court of Appeals in support of its first decision (272 Fed. 223) were decided *before* the Act of Congress was passed, and also *before* there was any valuation clause in the regulations.

Regarding this valuation clause, the Court of Appeals (p. 229) says:

"Granting such a restriction is valid and binding where there has been mistake or delay in the transmission or delivery, or where the message has been transmitted but not delivered, whether such errors have been caused by the negligence of the service of the company, or otherwise, we do not consider non-delivery as the full equivalent of non-transmission."

We respectfully contend, however, it is immaterial whether "non-delivery" is the full equivalent of "non-transmission" or not, because the regulation in respect to the valuation of messages provides that the company *in any event* shall not be liable beyond the \$50 in case of mistakes or delays in transmission or delivery, but also provides that the company shall not in *any event* be liable *beyond \$50* for the *non-delivery*, whether caused by the negligence or otherwise. The rule is as definite and specific as to *non-delivery* as to *non-transmission*.

Since the Act of Congress and the approval by the Interstate Commerce Commission of this valuation

clause of the regulation, its validity has been upheld by the Commission in

*Cultra vs. Western Union*, 44 I. C. C. 670.

There the Commission said:

"The liability of the carrier is limited to the sum of \$50, unless a greater value is declared. If a greater value, an additional charge must be paid. The same limitation of value is observed in the form of express rates prescribed in 'Express Rates and Practices, Accounts and Revenues,' 28 I. C. C. 132-137."

The *Cultra* case was expressly approved by this court in

*Postal Tel. Co. vs. Warren Godwin Lumber Co.*, 251 U. S. 27. (See p. 31.)

In that opinion this court also expressly approved the following cases, in which the valuation clause in the regulations here in question was upheld:

*Bailey vs. Western Union*, 97 Kans. 619;

*Western Union Tel. Co. vs. Schade*, 137 Tenn. 114.

This provision of the regulations, therefore, has no relation to the degree of negligence, whether simple or gross, nor to the place where the negligent act

occurred, whether it be at the sending or the receiving office of the company. In

*Frederick vs. Western Union Tel. Co.*, 189  
Iowa 1138, 179 N. W. 934.

there were present the elements of non-delivery and gross negligence. In the opinion, based upon the recent Federal authorities, the court said, page 936:

"Where the telegraph company is grossly negligent it may be made to respond for such negligence beyond the price of sending such telegram, but not to exceed \$50."

In

*Klotz vs. Western Union Telegraph Co.*, 187  
Iowa 1355, 175 N. W. 825.

the Supreme Court of Iowa upheld this provision, making the following statement in the course of its opinion:

"We are not unmindful of the fact that State courts, dealing with the subject matter now under consideration, have reached different conclusions, but when the Supreme Court of the United States has spoken upon and given a construction to the Acts of Congress the construction given controls the action of the State courts. *When the Supreme Court says that the Act of 1910 was intended to control telegraph companies, and when it says the Act empowered telegraph companies to establish reasonable rates, subject to the control which the*

*Act to regulate commerce exerted, and when it says that the power thus given carries with it the authority to provide a rate and the right to fix a reasonable limitation of responsibility, bottomed on the rate, it follows that when the company proceeds upon that theory, fixes its rates and fixes the liability for negligence, bottomed on the rate, the liability fixed in the contract is the only liability to which the company can be subjected."*

In *Jacobs vs. Western Union Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31, the validity of the valuation clause above quoted was involved. Basing its opinion largely upon the railroad and express cases herein cited, the court said:

"But the provision as above set out, limiting the liability to \$50 for mistakes or delay in transmission, or delivery finds application to the case and must control our disposition of it; for that was the value indorsed on the back of the message and became a part of the contract."

And also:

"And the fact that this action is brought by the sendee of the message does not prevent the defendant company from claiming the benefit of the limitation of recovery. It is true the action is not between the immediate parties to the contract, but the contract created a duty of prompt delivery by the company, for a violation of which the sendee may maintain an action sounding in tort. He gets his action through the instrumentality of the con-

tract, and out of which his right must arise. He must, therefore, accept the provisions of the contract, which limit the undertaking of the company."

*Gardner vs. Western Union Tel. Co.*, 231 Fed. 405.

In *Western Union vs. Kaufman*, 62 Okla. 160, 162 Pac. 708, the defendant in a suit for damages upon an interstate message specially pleaded, first, the un-repeated message clause; second, the agreed valuation clause; third, the sixty-day clause, providing for written notice of the claim. The lower court sustained demurrers to these special defenses, and the judgment was reversed on appeal, the court saying (see last paragraph):

"The special defenses which they pleaded and relied upon here were good and that the trial court committed an error in sustaining a demurrer thereto."

In *Bailey vs. Western Union Tel. Co.*, 97 Kans. 619, 156 Pac. 716, the validity of the valuation clause pleaded in this case was involved. The court said:

"Prior to the passage of the Act of Congress in June, 1910, whatever may have been the law governing the right to recover damages on account of the delay in the delivery of telegraph messages, since the passage of that Act the decisions appear almost unanimous that the limitations on the liability of telegraph companies for damages caused

by delay in delivering the messages are governed by the regulation above set out, and that no other recovery can be had" (citing numerous cases).

In *Hartness vs. Western Union Tel. Co.*, 112 S. C. 11, 99 S. E. 759, the suit was upon an interstate message, and a verdict rendered against the telegraph company. On appeal the court reduced the judgment to \$50, the amount of the agreed valuation of the message, basing its decision upon the ruling of the Interstate Commerce Commission in the case of *Cultra vs. Western Union*, 44 I. C. C. Rep. 670, quoting at some length from the report of the Commission.

#### THE RULE AS TO VALUATION IN THE RAILROAD AND EXPRESS CASES

In the *Cultra* case, *supra*, approved by this Court, the Interstate Commerce Commission, basing its opinion largely upon "The Express Cases," construing similar contracts, said:

"The sender of a telegram occupies much the same position as a consignor of an express package."

This court has held a similar valuation clause valid in all the recent cases relating to express companies and railroads. The principal cases are:

*Adams Express Co. vs. Croninger*, 226 U. S. 491;

*Kansas City vs. Carl*, 227 U. S. 639;

*Missouri Ry. vs. Harriman*, 227 U. S. 657;  
*Wells Fargo vs. Neiman-Marcus Co.*, 227 U. S.  
 469.

In all these cases it is held that the shipper is limited in the case of the loss of the goods to the value declared as a basis of rates, without regard to the place where the negligent act occurred. This court in its approval of the *Cultra* case has applied this doctrine to telegraph companies. *Adams Express Co. vs. Croninger*, *supra*, is the first and leading case on the subject, and will be found cited and approved at almost every term of court since it was decided in 1912. There the action was to recover the full market value of a package containing a diamond ring, which was delivered by the plaintiff below to the express company at its office in Cincinnati, Ohio, consigned to Augusta, Georgia.

"The package was never delivered." The court does not inquire whether the ring was lost at Cincinnati, Ohio, or at Augusta, Georgia, or at some intervening point. It simply holds that the contract declaring the value of the property fixed upon as a basis of the rate is valid, and determined the measure of damage in case the package was never delivered. In that case the valuation was \$50. The clause of the contract was in substance the same as the contract here. Inasmuch as it is not dependent upon service, but is an agreement as to value in case the property is lost, it was immaterial to the case what was the

degree of negligence or whether the package was lost at the *originating point or the point of destination*.

We respectfully call the court's attention to the following paragraphs of the opinion in *Adams Express Co. vs. Croninger*, which we contend are controlling:

"It has, therefore, become an established rule of the common law, as declared by this court in many cases, that such a carrier may, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper *in case of loss or damage to an agreed value, made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

\* \* \* \* \*

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. **The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater.** *The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles*

*of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."* (Italics ours.)

In *Wells Fargo vs. Neiman-Marcus Co.*, 227 U. S. 469, the action was to recover from the express company the loss of a package of furs "shipped from New York to Dallas, Texas, and never delivered." The agreement as to value in case of loss was substantially the same as in this case. The court determines that in the case of loss the shipper is held to that declared value. The court said:

"The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

Upon this holding the judgment was reversed. There is no discussion as to whether the package was lost at the receiving office or at some intermediate point.

In *Dorton Bros. vs. Southern Pacific Co.*, 151 Cal. 763, plaintiffs delivered to the railroad company for shipment two horses, which were valued for rate-making purposes at \$20 each. The horses were injured or killed in transit through the *gross* negligence of the defendant. Plaintiff sued for \$2700, their actual value. The court held that the plaintiffs were limited to the value stated, and that the contract was

not a contract limiting liability, but was a contract dealing primarily with value as a basis upon which freight rates were paid.

We can perceive no difference in respect to this value whether the horses, after they were delivered to the railroad company for shipment, were killed through the negligence of its servants at the shipping point, or at the terminal or any intermediate point.

Respondent contends that the Federal rules as to limitation of liability have no application where there is gross negligence, basing his contention on the fact that in the case of *Postal Tel. Co. vs. Bowman-Bull Co.*, 290 Ill. 155, where there was said to be gross negligence, this court denied certiorari (251 U. S. 562). No opinion was filed, and therefore it does not appear what was the basis of the order. Refusal of certiorari does not always mean approval of the result below. If the degree of negligence was of importance when the relations between a telegraph company and its patrons were relations purely of contract, it is difficult to understand how that question can have any significance now, when the limitations of liability, as Justice Brandeis so pithily remarked in the *Estere* case, do not grow out of agreement and cannot be varied by lack of agreement, but are an inherent part of the rate structure itself. *In any event in the Bowman and Bull case there was no valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission.*

*Therefore, the question as to the validity of such a regulation did not arise.*

The most recent decision of this court construing the valuation clause of express company contracts is the case of

*American Railway Express Co. vs. Levee,*

decided October 22, 1923, 1 Adv. Opinions, page 4.

In that case, as here, there was an agreed valuation of *not exceeding* \$50. The defendant relied upon this limitation of liability, which the State court denied. This court held the limitation to be valid, saying:

"Under the law of the United States governing interstate commerce, the stipulation constituted a defense to liability beyond \$50, unless plaintiff should prove some facts that took the case out of the protection of the contract."

In the present case, if at the time the receiving clerk, Margaret Brown, whose inadvertence caused the non-delivery, was handling this message at the Boise office, she had also had in her possession a message which had been received over the wire and was ready for delivery at that point, and through the same act of inadvertence, both messages had by her been misplaced and neither of them delivered, the court cannot consistently, with the comprehensive scope of the Act of Congress, hold the company liable, or the valuation clause inapplicable, in the one case and not in the other. *The Act of Congress makes no such*

*distinction. Its application is not restricted to but a part only of interstate messages. It was not the intention of Congress that the common-law measure of liability should apply to a part of the service and the Act of Congress to the other. Certainly, Congress had power to include this case in the uniform national rule. The question is, did it do so? We think the answer has been given by this court. In view of its decisions that Congress, by the Act, intended to regulate the entire field of interstate telegraphy, we think a decision that it has but a limited scope in respect to such messages is error.*

#### GROSS NEGLIGENCE

The District Court, in its opinion given upon its first trial of this case, decided there was no gross negligence in the handling of the message. (See Tr., p. 158.)

On the second trial that court again found that the non-transmission of the telegram was due to *inadvertence* and was not due to any wilful, malicious or wanton act, and

"That the clerk, Margaret Brown, was capable and an efficient employe, and the non-transmission of the telegram was due to her *inadvertence* and was *not* due to any wilful, malicious or wanton act on her part."

"That the failure to transmit and deliver the said telegram under the circumstances as hereinbefore

found *did not constitute gross negligence* unless the failure to transmit a telegram constitutes gross negligence *per se*" (Findings XIII and XIV, Tr. p. 49).

But even if such failure be gross negligence *per se*, nevertheless the *valuation clause* of the message regulations, as pointed out above, is not a limitation of liability but is an *agreed valuation*, and applies in cases of gross negligence equally with that of any other degree.

*The Circuit Court of Appeals did not take the position that the valuation clause involved here is ineffective in all cases against gross negligence; but, on the contrary, said "granting such restriction is valid—that is, valid even where there is gross negligence in respect to non-transmission—yet, says the court, "We do not construe non-delivery, as the full equivalent of non-transmission" (272 Fed. 229, Tr. p. 171), which brings us back to the question discussed above as to whether Congress by the Act of 1910 intended to fix a uniform rule of liability for interstate messages which fail for certain reasons and not for those which fail for other reasons. Such construction is inconsistent with the expressed purpose of Congress to subject all interstate messages to uniform Federal rule. It was not intended by the Act that inquiry should be made as to the cause or place of failure, in order to ascertain whether the case is controlled by the national rule.*

It was said by this court in the *Warren Godwin* case that the dominant purpose of the Act of 1910 was to subject such companies as to their interstate business to the rule of equality and uniformity. The Act expressly provides against all discrimination. It also provides for the classification of messages with different rates and different liabilities. *The plaintiff in this case, though paying the lowest rate provided in the regulations, secured the same judgment as if he had paid the highest rate and the message had been valued at \$1,500 instead of \$50. If, therefore, it be held that the company is under the same measure of liability to one who pays the lowest rate under the lowest valuation as it is to one who pays the highest rate and under a higher valuation, then the fundamental purpose of the Act is defeated. In view of this fact, the following language of this court in the Warren Godwin case seems especially applicable. The court says (see bottom of p. 30):*

"In the third place as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be classified . . . and different rates may be charged for different classes of messages, it would seem unmistakably to draw under Federal control the very power which the construction given below to the Act necessarily excluded from such control."

## AS TO THE SIXTY-DAY CLAUSE FOR PRESENTING CLAIMS

The sixth regulation on the message blank provides:

"6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission."

The message was filed for transmission on November 30, 1917. No claim was presented in writing for damages herein until June 18, 1918. (See last paragraph of letter of plaintiff, Tr., p. 84.) The plaintiff, Czizek, replies that he did not know of the fact that the message had been sent until he returned to Boise in *February*, when the failure of the message was called to the company's attention, at which time the agent promised to investigate the matter and ascertain the cause of the failure, but without waiving the defense as to the presentation of the claim, and no claim was presented until *four* months later. As to this question, the court found as follows:

"That there was no written or formal demand for damages by plaintiff until June 18, 1918, at which time he wrote the letter introduced in evidence as Plaintiff's Exhibit No. 4, claiming damages in the sum of Forty-five Hundred Dollars (\$4500), and in response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of plaintiff's failure to make demand within the pe-

riod specified on the telegraph blank" (Finding XVII, Tr., p. 50).

The court's Conclusion of Law was:

"1. That the acts of defendant and its employes do not constitute a waiver of the provision requiring claim for damages to be made in writing within sixty days of the time the message was filed with defendant."

The validity of this sixty-day clause of the regulations was involved in the case of

*Gardner vs. Western Union Tel. Co.*, 231 Fed. 405,

where it was held to be binding upon the receiver of the message. This decision was approved by this court in the *Warren Godwin* case. This requirement that *all* claims must be presented in writing within sixty days is not limited to messages which have been put in the course of transmission. There is no such exception in the statute or in the regulations. The requirement is not dependent upon whether the negligence is gross or simple, or whether the message failed at the point of origin or of delivery. There is as much reason for the presentation of a claim in one case as in another. The regulation provides that the claim must be presented in writing "*in any case*," else "the company will not be liable for damages." This regulation is not a limitation for liability for negligence, but a rec-

ognition of such liability. It is stated, 37 Cyc., p. 1689, that the provision is "a recognition of such liability coupled with a reasonable requirement that the company shall have an opportunity to investigate the facts while its records are still in existence and the facts fresh in the memory of witnesses." (See *Southern Express Co. vs. Caldwell*, 21 Wallace, 264.)

THE CARRIER HAS NO AUTHORITY TO WAIVE THE PRO-  
VISION FOR PRESENTING CLAIMS

The company has no right to waive such provision.

*Western Union vs. Esteve Bros.*, 256 U. S. 556;  
*Chicago & Alton R. R. Co. vs. Kirby*, 225  
U. S. 155.

In *Georgia, Florida, etc. Co. vs. Blish Milling Com-  
pany*, 241 U. S. 190, 60 L. Ed. 948, this court consid-  
ered the question of waiver in the following language:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In *St. Louis etc. Co. vs. Starbird*, 243 U. S. 592, 61 L. Ed. 917, the court holds that notice to the dock master was not a compliance with a requirement of the bill of lading that claims of damage be reported to the delivering line within thirty-six hours. The court points out that the case arose before the Act of March 4, 1915; hence it is clearly an authority here.

In *Southern Pacific Ry. Co. vs. Stewart*, 248 U. S. 446, 63 L. Ed. 350, the cause of action also arose before 1915, and the court held that it was error to submit the question of waiver to the jury and that the court below should have granted the carrier's request for a directed verdict. In that case also it appeared that the local agent of the company knew of the loss immediately. In *Gooch vs. Oregon Short Line R. Co.*, 264 Fed. 664, this Court quotes the following from the *Blesh Milling* case at page 666:

"Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations."

At page 667 the court said:

"It is true that in the present case the carrier had actual notice of the injury complained of, and through its agents sought, without success, a settlement of the damages occasioned thereby; but the offer of settlement was refused, and at no time, so far as appears, was the amount of his claim stated, even verbally, by the plaintiff in error or by any representative of his."

We think the cases above cited are clearly applicable here, and that in order to prevent discrimination and uphold the rule of uniformity prescribed by the Commerce Act, the rule applied to carriers of goods must be applied to telegraph and cable companies.

PLAINTIFF HERE DID NOT PRESENT THE CLAIM UNTIL MORE THAN SIXTY DAYS AFTER DISCOVERING THAT THE MESSAGE HAD BEEN SENT.

Plaintiff says he did not know of the message until February; but even then he presented no claim in writing until more than sixty days thereafter, and the court found the requirement was not waived.

In

*Postal Tel. Co. vs. Nichols*, 159 Fed. 43.

the claim was not presented in writing within sixty days from the time the message was filed. It was presented, however, within sixty days from the time

that plaintiff received knowledge of its non-delivery. The court said:

"There was testimony on the part of the defendants in error to the effect that they did not know of the non-delivery of the telegram to Captain Richardson prior to July 11, 1903, which was much within the sixty-day period."

The same conclusion was reached in

*Western Union Tel. Co. vs. Lee*, 174 Ky. 210.

A fair conclusion from these decisions is that if the claim had not been presented within sixty days from the discovery, the provisions of the contract would have constituted a defense to the action. The District Court in the present case adopted this view, basing its opinion upon the two cases last cited. (See Tr., bottom of p. 156.)

In the court below, respondent cited the case of

*Larsen vs. Postal Tel. Co.*, 150 Ia. 748.

That opinion was based upon a special provision of a statute of Iowa which would be invalid since the amendment of 1910 to the Interstate Commerce Act.

PLAINTIFF'S TESTIMONY UPON WHICH THE JUDGMENT WAS BASED AS TO WHAT HE WOULD HAVE DONE WITH RESPECT TO THE SALE OF HIS STOCK HAD THE MESSAGE BEEN RECEIVED WAS INADMISSIBLE.

Plaintiff testified, over objection, that if he had received the telegram *he would have sold the stock*. The judgment was based upon this testimony. The District Court at the first trial held that such evidence was inadmissible, saying:

"The inherent difficulty held to be insuperable in many cases is the importance of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened."

And further:

"Applying the principle, in many and so far as I am advised in most, of the decided cases, I feel impelled to sustain the defense." (Citing cases, see Tr., pp. 159-60.)

On the second trial the court found (see Finding XV, Tr., p. 50):

"In deference to what is understood to be the view of the Circuit Court of Appeals, it is found that if plaintiff had received the telegram promptly he would have accepted the offer and could have delivered the stock in time to avail himself of such offer" (Finding XV, Tr., p. 50).

The telegram did not, however, contain any offer to buy plaintiff's stock. His attorney stated that he was *inclined* to accept the offer made him. What plaintiff in such case of uncertainty would or would not have done is only *conjecture*. Such evidence is merely the *opinion* of an interested party given after the event was known. After it was ascertained that the bank had gone into liquidation and that a sale at the time would have been advantageous, plaintiff was of the opinion that he would have sold. If it had turned out that the bank did not liquidate, but the stock had *advanced* in value, plaintiff's opinion as to what he would have done might have been different. Such evidence has uniformly been excluded by the courts. It is said in

*Hall vs. Western Union*, 59 Fla. 275, 27 L. R. A. (N. S.) at p. 642:

"The acceptance of the offer depended upon the independent will of the addressee, and this contingency precludes recovery."

The principal cases are:

*Richmond Hosiery Mills vs. Western Union Tel. Co.*, 123 Ga. 216;

*Western U. Tel. Co. vs. Watson*, 94 Ga. 202;

*Beatty Lumber Co. vs. Western U. Tel. Co.*, 52 W. Va. 410;

*Kiley vs. Western U. Tel. Co.*, 39 Hun 158;

*Smith vs. Western Union*, 83 Ky. 104, 4 Am. St. Rep. 126;

*Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371;

*West. Union vs. Hall*, 124 U. S. 444;

*Alexander vs. Western U. Tel. Co.*, 126 Fed. 445.

In the *Richmond Mills* case, *supra*, there was an offer to sell cotton yarn "delivery commencing in October." By an error in transmission the telegram read "delivery commencing in December." Testimony was offered to the effect that if the message had been transmitted correctly the offer would have been accepted, and the court, after quoting from the cases on the subject, said:

"So, in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice-president, thinks now that it would have accepted the offer; but it is exceedingly speculative, as the basis for damages, to say that, if an offer had been received, the plaintiff would have accepted it and would have derived certain advantages from it.

In the *Beatty Lumber* case, *supra*, the telegram quoted a price on a certain quantity of lumber. The telegram was not delivered and the question arose as

to the admissibility of the evidence to show that the proposals would have been accepted. The court says:

"To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated, as a witness, that his firm would have accepted that proposal if it had been received. *This will not prove the fact.* That evidence does not make the fact certain. The opinion of this witness months afterward cannot go to that length. In *McCall vs. W. U. Tel. Co.*, cited, the party to whom the telegram was addressed said that he would have accepted its proposal, but the court said this did not change the nature of the matter. So, in *Smith vs. W. U. Tel. Co.*, cited, the jury found that if the telegram had been received, the party would have sold his stock, but the court said: 'What a person might or would have done in a certain event is not the proper subject of a special finding, and will not be considered.'"

In the *Watson* case, *supra*, the suit was based upon a claim that had the message been properly transmitted, plaintiff would have sold certain cotton gins to Pitner, and Pitner testified that he would have accepted the offer. The court says:

"In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true, Pitner says now that he would have made it, but we cannot tell whether he would have done so or not. He might

have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery."

In the *Kiley* case, the message was an offer to buy of Hilton & Waugh a quantity of oil. Hilton & Waugh were at liberty to reject the offer had the message been received. The court said:

"But how can it be said with any degree of certainty that Hilton & Waugh would have accepted the plaintiff's offer to purchase of them the quantity of oil mentioned? They were under no legal obligation to accept his proposition. The claim of the plaintiff that they would have done so is wholly speculative."

In *Western U. Tel. Co. vs. Ferguson*, 157 Ind. 64, 54 L. R. A. 846 and on 849, the court states:

**"The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff's present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture.** Thus the mental anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency."

As above stated, in *Hall vs. Western U. Tel. Co.*, 59 Fla. 275, 51 So. 819, 27 L. R. A. (N. S.) 639 and on 642, it is said:

"The acceptance of the offer depended upon the independent will of the addressee, and this contingency precludes recovery."

In *Smith vs. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, plaintiff employed a stock broker to buy stocks to sell upon plaintiff's order. The broker sent a telegram on November 18, notifying plaintiff of the purchase of certain shares of stock, but the message was not delivered. The stocks declined in value and became worthless. Plaintiff, who sued the telegraph company for damages for failure to deliver the dispatch, testified at the trial that, if the message had been delivered notifying him of the purchase, he would have ordered the stock sold and averted the loss. Among other special issues submitted to the jury were the following: (See 4 Am. St. Rep., p. 129.)

"9. If the jury shall find that the telegram of the 18th of November, 1879, was not received by Smith, then they will say whether, if it had been received by him, he would have ordered his stock, or any part of it, to be sold, either on the nineteenth or twentieth days of November, 1879.

Answer. He would."

The court held that this testimony was inadmissible, stating as follows (p. 133) :

*"If the dispatch had been received, then he might or might not have taken it and acted. It rested altogether with him, and is unlike the case of an agent who is ordered by a telegram to do a certain act, but which by reason of its non-delivery he does not do, thereby entailing a loss upon his principal."*

And further (p. 134) :

*"It is urged, however, that the jury, by the answer to the ninth interrogatory, found that if the appellant had received the telegram, that he would have ordered his stock sold; and that, as this finding was not objected to, it is, therefore, conclusively shown that the loss would not have occurred if the message had been delivered. In our opinion, **what the appellant might or would have done could not be the subject of a special finding.** It was not a matter of fact, and the appellee was not, therefore, bound to object to it; and it does not follow, therefore, that it is conclusively shown that the loss was the direct result of the appellee's failure to deliver the message."*

In *Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371, the Court ruled on the admissibility of similar evidence. The question put to the witness was as follows (p. 380) :

"Q. This 1,208,000 feet of Grand Haven pine,

which you testified was in the possession of A. M. Dodge and Company in its yards at Tonawanda, on or about November 6, 1890, **would you have sold** that amount of pine to the plaintiff in this action at the prices mentioned in the contract in suit?"

This was held inadmissible.

In respect to such evidence, the court said:

"There are several objections to this question, but a statement of two of them will suffice to show that the referee did not err in his ruling. In the first place **the question did not call for a fact, but instead for a mere operation of the witness' mind, the secret undisclosed intent of the witness** in the event of the presentation of a situation calling for action. It did not inquire of Crane whether he had tendered that quantity of pine lumber to the plaintiff at the same rate as the contract called for, or that he offered it to him, but sought merely to elicit from him his secret mental operation, which was safely beyond contradiction. *Such evidence is not admissible.*"

In this court it is held, in effect at least, in

*Western Union Tel. Co. vs. Hall*, 124 U. S.

444,

that such evidence was inadmissible. In that case the plaintiff, Hall, sued the telegraph company for damages, claiming that by the delay in the delivery of the telegram he lost the opportunity to sell certain shares

of oil stock and that, if he had received the message, he would have sold the stock. The court said:

"Whether or not the plaintiff would or would not have sold it is altogether uncertain."

In *Alexander vs. Western Union Tel. Co.*, 126 Fed. 445, the plaintiff sued for damages, alleging that by reason of the delay in the delivery of a telegram he was unable to attend the funeral of his father. Plaintiff claimed that, had the message been delivered, he would have attended the funeral. The court, in sustaining the demurrer, said:

"What the plaintiff might or might not have done under a different set of circumstances is rather too uncertain and problematical to form the basis of a lawsuit."

Petitioner therefore earnestly contends that the damages claimed are not such as would follow as a legal certainty as the proximate result of the defendant's act.

The rule on this subject, as suggested by one of petitioner's present counsel in his article in Cyc., entitled "Telegraphs and Telephones," 37 Cyc. 1760, and which counsel for petitioner still believe is a sound statement of the law, is as follows:

"Where the message relates to a proposed contract between plaintiff and another person, but is neither an acceptance of a previous offer nor itself

a definite offer, but only an invitation to submit an offer or to meet or correspond with the sender for the purpose of further negotiation, the failure duly to deliver the message is not, as a matter of law, the proximate cause of the failure of the negotiations to result in a binding contract, and damages for the loss of a contract which might or might not have resulted from further negotiations being too remote and uncertain, only nominal damages can be recovered."

The above rule of law taken from Cyc. has been quoted with approval in the following cases:

*White vs. Western Union Tel. Co.*, 153 N. Y. App. Div. 684;

*Security Mortgage Co. vs. Western Union*, 141 Ark. 79, 216 S. W. 10;

*Western Union vs. Caumissar*, 160 Ky. 569.

In *White vs. Western Union*, p. 686, the court said:

"The complaint, as it seems to me, is defective, because it does not show that any damages were sustained by reason of the defendant's failure to forward and deliver the cablegram. There is no allegation in the complaint to the effect that Behn had offered to sell the onions at the price stated in the message delivered to defendant. Nor was the message an acceptance of any offer. The message, so far as appears, was an inquiry as to whether the 'onions offered are crates 20 kilos net.' What the answer would have been it is useless to conjecture. In this respect the allegations of the complaint fall within the rule stated in 37 Cyc. 1760."

It will be observed that the telegram to respondent in the case now on argument was neither an offer, nor an acceptance of an offer, but, like the message in the above case, was but an inquiry as to whether respondent would sell.

In the *Caumissar* case the court said, respecting such a message:

"Whether he could have made the plaintiffs an offer, and what offer he would have made and what disposition they would have made of the offer rests wholly in the domain of uncertainty."

THE CIRCUIT COURT OF APPEALS, IN ITS LAST DECISION,  
WAS NOT BOUND BY ITS RULING ON THE FORMER  
APPEAL.

The Court of Appeals held that its decision on the former appeal had become the law of the case and was controlling of this appeal, citing some early cases, and among others the case of

*Messenger vs. Anderson*, 171 Fed. 785.

But this case was carried here and decided in

*Messenger vs. Anderson*, 225 U. S. 436.

It is there said by this court, speaking through Mr. Justice Holmes: "It was held by the Circuit Court of Appeals after the affirmance by the Supreme Court

that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment." In reversing this ruling, this court said:

"In the absence of statute the phrase, the law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

The court held that the Court of Appeals should have reversed the judgment and construed the will as did the State court, if for no other reason, because that construction "was right."

The last expression of this court on the rule invoked is found in

*Chase vs. United States*, 256 U. S. 1,

where the court said (p. 10):

"The proposition has a relevant and conclusive application when a judgment of a former action is pleaded, but limited application when urged in the same suit; it expresses a practice only, and useful as such, but not a limitation of power. *Messenger vs. Anderson*, 225 U. S. 436."

See, also,

*Moss vs. Ramey*, 239 U. S. 539;

*Johnson vs. Cadillac Motor Car Co.*, 261 Fed. 878.

Petitioner contends that the judgment should be reversed.

Respectfully submitted,

FRANCIS R. STARK,

195 Broadway, New York,

BEVERLY L. HODGHEAD,

14 Montgomery St., San Francisco,

J. H. RICHARDS,

OLIVER O. HAGA,

Boise, Idaho,

JOSEPH L. EGAN,

195 Broadway, New York,

Counsel for Petitioner.

FILE COPY

FILED

FEB 18 1924

WM. A. STANB

CLERK

No. 300

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH  
COMPANY, a Corporation,

*Petitioner,*

vs.

J. A. CZIZEK,

*Respondent.*

**BRIEF OF RESPONDENT**

*On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Ninth Circuit.*

RICHARD H. JOHNSON,  
CAREY H. NIXON,  
Boise, Idaho,  
*Counsel for Respondent.*

## TOPICAL INDEX

	<i>Page</i>
STATEMENT OF THE CASE.....	3
ARGUMENT.....	12
The Unrepeated Message Clause.....	12
Filing the Regulation with the Interstate Commerce Commission does not affect the power of Courts to construe such regulations.....	15
Case of <i>Postal Teleg. Co. vs. Dickerson</i> shown not to be case of non-transmission.....	19
Regulations of Carrier Strictly Construed against Carrier.....	21
Failure to transmit is gross negligence as a matter of law.....	23
The Fifty-Dollar Valuation Clause.....	31
Effect of the decision of the Commission in <i>Cultra</i> or <i>Unrepeated Message Case</i> , 44 I. C. C. 670, S. C. 61 I. C. C. 541.....	39
The Sixty-Day Clause for Presenting Claims.....	50
The Showing as to the Damages Sustained Was Sufficient.....	64
The Decision of the Circuit Court of Appeals as to the "Law of the Case" on Second Appeal Was Correct.....	75

## TABLE OF CASES REFERRED TO BY RESPONDENT

	<i>Page</i>
<i>Beatty Lumber Co. vs. Western Union Teleg. Co.</i> , 52	
W. Va. 410; 44 S. E. 309.....	22, 67
<i>Birney vs. Printing Co.</i> , 18 Md. 341; 81 Am. Dec. 607.....	24, 29
<i>Boston &amp; Maine Railroad vs. Piper</i> , 246 U. S. 439.....	16
<i>Bowman &amp; Bull Co. vs. Postal Teleg. Co.</i> , 290 Ill. 155; 124 N. E. 851; S. C. 251 U. S. 562.....	25
<i>Clay Co. Prod. Co. vs. Western Union Teleg. Co.</i> , 44 I. C. C. 670, 61 I. C. C. 541.....	39
<i>Cultra vs. Western Union Teleg. Co.</i> , 44 I. C. C. 670; S. C. 61 I. C. C. 541.....	14, 39, 40
37 Cyc., p. 1686, Tit. Telegraphs and Telephones.....	22
<i>Dickerson vs. Western Union Teleg. Co. (Miss.)</i> 74 So. 779.....	19
<i>Fireman's Fund Ins. Co. vs. Norwood (C. C. A. 8th Cir.)</i> 69 Fed. 71.....	64
<i>Freschen vs. Western Union Teleg. Co.</i> , 189 N. Y. Supp. 649.....	30
<i>Georgia Ry. Co. vs. Blish M. Co.</i> , 241 U. S. 190.....	56
<i>Great Northern Railway Co. vs. Merchants Elevator Co.</i> , 259 U. S. 285.....	16
<i>Hall vs. Western Union Teleg. Co.</i> , 59 Fla. 275, 27 L. R. A. (N. S.) 642.....	65
<i>Hartford Life Ins. Co. vs. Unsell</i> , 144 U. S. 439.....	63
<i>Hays &amp; Bros. vs. Western Union Teleg. Co.</i> , 7 S. C. 16; 48 S. E. 608.....	61
<i>Hill vs. Western Union Teleg. Co.</i> , 85 Ga. 425; 11 S. E. 874.....	59
<i>Insurance Co. vs. Eggleston</i> , 96 U. S. 572.....	63
<i>Insurance Co. vs. Norton</i> , 96 U. S. 234.....	62
<i>Leedy vs. Western Union Teleg. Co.</i> , 130 Tenn. 547; 172 S. W. 278.....	31
<i>Lothian vs. Western Union Teleg. Co.</i> , 25 So. Dak. 319; 126 N. W. 621.....	37
<i>McCullough vs. Home Ins. Co.</i> , 155 Cal. 659; 102 Pac. 914.....	63
<i>Messenger vs. Anderson</i> , 225 U. S. 436.....	75
<i>Milwaukee R. Co. vs. Arms</i> , 91 U. S. 489.....	38
<i>Norfolk Southern Railroad Co. vs. Chatman</i> , 244 U. S. 276.....	18
<i>Passmore vs. Western Union Teleg. Co.</i> , 78 Pa. St. 442, 455.....	24

<i>Pennsylvania R. Co. vs. Interstate Commerce Comm.</i> , 193 Fed. 81	48
<i>Pennsylvania R. Co. vs. Stineman Coal Co.</i> , 242 U. S. 299	47
<i>Phillips vs. Grand Trunk Ry.</i> 236 U. S. 662	49
<i>Pierce Co. vs. Western Union Teleg. Co.</i> , 177 N. Y. Supp. 598	29
<i>Postal Teleg. Co. vs. Warren Godwin Lbr. Co.</i> , 251 U. S. 27	39
<i>Preston vs. Prather</i> , 137 U. S. 604	38
<i>Primrose vs. Western Union Teleg. Co.</i> , 154 U. S. 1	24
<i>Richmond H. M. Co. vs. Western Union Teleg. Co.</i> , 123 Ga. 216; 51 S. E. 290	66
<i>Roberts vs. Cooper</i> , 20 How. 481	76
<i>Royal Ins. Co. vs. Martin</i> , 192 U. S. 149	22
<i>Smith vs. Western Union Teleg. Co.</i> , 83 Ky. 104; 4 Am. St. Rep. 126	71
<i>Talbot vs. Metropolitan Life Ins. Co.</i> (C. C. A. 5th Cir.) 142 Fed. 694	63
<i>Texas and Pacific Ry. Co. vs. Reiss</i> , 183 U. S. 621	21
<i>United States Teleg. Co. vs. Wenger</i> , 55 Penn. St. 262; 93 Am. Dec. 751	24, 30
<i>Wann vs. Western Union Tel. Co.</i> , 37 Mo. 472; 90 Am. Dec. 395	30
<i>Weld vs. Postal Teleg. Co.</i> , 199 N. Y. 88; 92 N. E. 418	35
<i>Weld vs. Postal Teleg. Co.</i> , 210 N. Y. 59; 103 N. E. 957	29
<i>Wheelock vs. Postal Cable Co.</i> , 196 Mass. 119; 83 N. E. 313	57
<i>Western Union Teleg. Co. vs. Boegli</i> , 251 U. S. 315	39
<i>Western Union Teleg. Co. vs. Caldwell</i> , 126 Ky. 42; 102 S. W. 840	70
<i>Western Union Teleg. Co. vs. Estere Bros. Co.</i> , 256 U. S. 566	25, 39
<i>Western Union Teleg. Co. vs. Fitts</i> , 13 Ga. App. 248, 79 S. E. 156	61
<i>Western Union Teleg. Co. vs. Hall</i> , 124 U. S. 444	68
<i>Western Union Teleg. Co. vs. Heathcoat</i> , 149 Ala. 423; 43 So. 117	58
<i>Western Union Teleg. Co. vs. Lange</i> (C. C. A. 9th Cir.), 248 Fed. 656	27
<i>Western Union Teleg. Co. vs. Stratemeier</i> , 6 Ind. App. 125; 32 N. E. 871	60



IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

---

OCTOBER TERM, 1923

---

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,	} <i>Petitioner,</i>
VS.	
J. A. CZIZEK,	} <i>Respondent.</i>

---

**BRIEF OF RESPONDENT**

---

*On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Ninth Circuit.*

---

**STATEMENT OF FACTS**

As respondent considers petitioner's statement of the case incomplete in many particulars, we are including a statement of facts.

The case was twice before the Circuit Court of Appeals (272 Fed. 223, 286 Fed. 478).

Respondent on and prior to November 30, 1917, was the owner of 50 shares of stock in the Idaho National Bank at Boise, Idaho. During the fall of 1917, David Miller, who was Vice-President of that bank, was engaged in purchasing its outstanding stock for the purpose of effecting a merger with the Pacific National Bank, at Boise.

Respondent discussed these matters with Miller, who suggested to him that he enter into this merger. Respondent told him he did not wish to enter into any merger but wished to sell his stock, that he had had some bad bank stock experience and did not wish to have the stock. They discussed the price of the stock pro and con. Miller told him he was going away and would be back at or near a certain time, and that they would have no difficulty about agreeing on the price, and that he, Miller, would buy respondent's stock (Tr. pp. 76-7). T. J. Jones, an attorney at Boise and a friend of respondent, owned 15 shares of the Idaho National Bank stock. Respondent then informed Jones about his talk with Miller, and that Miller would be back with money to buy their stock. Respondent, who was leaving shortly thereafter for his home at Oakland, California, requested Jones to act for him when Miller returned and that they would sell their stock together, as Miller wished to buy both their holdings together. Respondent before leaving for California again saw Miller and informed him that

Mr. Jones would represent him in relation to the sale (Tr. p. 77).

Miller returned to Boise to purchase the Jones' and respondent's stock in November, 1917. He had already purchased a large amount of stock in that bank for cash and had a large deposit in the bank. He called on Jones for that purpose and their talk (Tr. p. 60) resulted in Jones, at Miller's request, drafting the following telegram, in triplicate (Tr. p. 62):

"Boise, Idaho, November 30, 1917.

"J. A. CZIZEK,  
5767 Shafter Avenue,  
Oakland, Calif.

"Miller advises Idaho National sold to Pacific Offers me ninety dollars per share, otherwise wait year and chances of liquidation; says if fails to get two-thirds stock, liquidation will follow. Will you take ninety dollars per share for yours? I am inclined to accept offer for mine. Answer.

"T. J. JONES."

Miller added to the typewritten draft of the telegram the word "answer", with a pen (Tr. p. 61). At the close of business on Friday, November 30, 1917, Miller's cash balance in the Idaho National Bank was \$84,003.51. At the close of business on Saturday, December 1st, 1917, this balance was \$33,943.11. His balance at the close of business on Monday, Decem-

ber 3d, 1917, was \$30,826.50, and at the close of business on December 4th it was \$30,818.41 (Tr. p. 97).

Jones on November 30, 1917, sent his son and law partner, Felix Jones, with the telegram to the office of petitioner in Boise. Felix Jones gave it to the operator at the desk and prepaid the charges thereon (Tr. pp. 89-90). Next day Miller inquired of Jones at his office if he had heard from respondent and was informed that he had not. Miller said he was very anxious to get the stock and said they should go ahead and close the deal and respondent's stock could be put in later, when Jones received it.

Felix Jones, at his father's direction, went to the telegraph office on the following day, Saturday, to inquire about an answer to the message. There was none and Jones asked the clerk to look through and see if a telegram had been sent to J. A. Czizek at Oakland (Tr. p. 90). She looked through some papers and said the telegram had been sent to Czizek. On Sunday, or Monday, he again inquired at the telegraph office, at which time they looked through some more files and the person behind the desk informed him that J. A. Czizek of Oakland had received the telegram (Tr. pp. 92-94).

T. J. Jones, not hearing from respondent, delivered his own stock to Miller and received in cash \$90.00 per share therefor (Tr. p. 96).

The telegram was never transmitted from the Boise office. It was not even placed upon the operator's

hook for transmission. When respondent first learned of the message, about the middle of February, 1918, the manager of the Boise office found the telegram among some records and files of some prior day's business. No one at the time of the trial remembered how it came there or anything about the message, but the theory was advanced over respondent's objections, that it must have been misplaced when someone was examining the files of that prior day's business. This evidence was stricken out on respondent's motion, because it was only conjecture and surmise as to how the message came into the other files. It is true, as stated on page 8 of petitioner's brief, that the Trial Court in Findings XII and XIII on the second trial found that through the inadvertance of Margaret Brown the message was placed in a file of previous messages which had been sent, but, as found by the Court of Appeals, there was no evidence whatever upon which to base these findings. On page 113 of the transcript is found the testimony of the Manager, Mr. Hackett, that he had no knowledge of the message or of its failure of transmission until the middle of February, 1918, when respondent first learned of it and called it to his attention.

Mrs. Holland, formerly Margaret Brown, testified (Tr. p. 121), that she did not remember anything regarding the message nor the circumstances of its delivery to the Western Union office. Her conjecture as to how it might have gotten into the files of the other day's business was stricken out (Tr. p. 122).

There was, therefore, no evidence upon which to base anything in the XII and XIII findings except that Margaret Brown was a capable and efficient employee, which under the circumstances was wholly immaterial. See opinion of Court of Appeals on Second Appeal (Tr. pp. 122, 286 Fed. 481).

The message was an unrepeatd message and was not valued. The bank afterwards, and before respondent had any knowledge of the attempt to send him the message, went into liquidation and the stock became and ever since has been worthless. Other facts and circumstances in the case were found by the Court of Appeals to bear out respondent's testimony that he would have immediately wired his acceptance and sent his stock to Jones to deliver to Miller.

Respondent's action was to recover \$4500.00, the damage he suffered by reason of his inability to complete the arrangements for the sale of his 50 shares of stock to Miller caused by the failure of the telegraph company to transmit the message.

The printed blank upon which the message was written, "*to guard against mistakes or delays*", contained the stipulations, rules and classifications of messages in force at that time, and which were filed with the Interstate Commerce Commission.

The material parts of these stipulations are:

- "1. The Company shall not be liable for *mistakes or delays* in the *transmission or delivery*, or

for *non-delivery* of any unrepeatd telegram beyond the amount received for sending the same

\* \* \*

"2. In any event the Company shall not be liable for damages for any *mistakes* or *delay* in the *transmission* or *delivery*, or for the *non-delivery* of this telegram, whether caused by negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing thereon at the time the telegram is offered to the Company for transmission, and an additional sum paid \* \* \*".

(Italics ours.)

On the first trial in the District Court, these stipulations were held to excuse the telegraph company for its total failure to transmit the message and for its representations to the sender that it had transmitted the message and that it had been received by respondent in Oakland.

The Court of Appeals reviewed and passed upon the various issues and upon this question held in substance that since the act of Congress of June 18, 1910 (36 Stat. 539), the interstate business of telegraph companies has been under Federal control and under the administrative control of the Interstate Commerce Commission, subject to a uniform national rule, and that there was no room for the exercise by the several

states of regulatory powers of penalizing the negligent failure to deliver promptly an unrepeatd message and that the reasonableness of the regulations on the back of the telegraph blank are primarily for the Interstate Commerce Commission to determine.

No question was raised by Court or counsel as to the power and duty of the Commission to determine the classification of messages and establish reasonable rates and regulations.

The Court of Appeals held that they did not apply to the facts of this case for the reasons set forth in the opinion (Tr. p. 167); 272 Fed. 228, and remanded the case for a new trial.

The second trial was upon the same record, except for the attempt by the telegraph company to meet the charge of gross negligence and to explain its failure to transmit by advancing the *theory* that the message *must have been inadvertantly misplaced* in other files by some previous day's business where it was afterwards found, and by showing that the clerk who received the message at the desk was a careful and efficient employee, but as before pointed out there was no evidence whatever as to how the message was misplaced, or by whom, if any, of petitioner's employees, so that the facts upon both appeals were exactly the same, and constituted a total and unexplained failure to transmit or to attempt to transmit the message, coupled with representations by petitioner's employees that it had been sent and had been received by respondent in

Oakland. The evidence at the trial also showed conclusively that if the message in question had been marked and paid for as a repeated message, it would have been subjected to the same routine as an unrepeated message up to the time it was placed upon the operator's hook for transmission, and that the repeating directions are for the operator, who, in transmitting it, requests the operator at a relay point or at the receiving office to repeat it back for accuracy (Tr. pp. 110-111). There was no evidence to show that if the message in suit had been marked and paid for as a repeated message, or if it had been insured, it would have met a different fate, or have been transmitted over the Company's wires.

The District Court at the second trial followed the law of the case as set forth in the decision of the Court of Appeals and rendered judgment for the respondent for \$4500.00 damages. The Company then took the case by writ of error to the Court of Appeals, and again made the same contentions that the stipulations on the telegraph blank excused the total failure to transmit. The Court of Appeals again recognized the rule that by reason of Congress having accorded to the Interstate Commerce Commission control of the regulation of rates to be charged by telegraph companies, they have authority to establish reasonable rates and also to classify messages, including authority to provide rates for unrepeated messages, and a corresponding reasonable limitation of liability where such lower rates are charged.

The Court further held that the identical question was urged on the former appeal and decided adversely to plaintiff in error, and that the decision in that case having become the law of the case, it was controlling upon the second appeal. (286 Fed. 478, Tr. Pp. 144-49)

Certiorari was granted by this Court to review the decision on the second appeal. No application for such a writ was made to review the first decision of the Court of Appeals, which was rendered April 4, 1921, and became final by the denial of the petition for rehearing on May 16, 1921, or nearly two years before the petition for the writ of certiorari was filed on April 5, 1923.

## ARGUMENT

The specifications of error and the cases cited will be discussed in the order in which they appear in the petitioner's brief.

### THE UNREPEATED MESSAGE CLAUSE

The rule announced by this Court in the cases cited that the interstate business of telegraph companies has been brought under Federal control and that the provisions of the Act of Congress placed them under the administrative control of the Interstate Commerce Commission and subjected them to a uniform national rule, was never questioned by respondent and was given full recognition by the Court of Appeals in this case.

It is admitted that the classification of messages into

unrepeated, repeated and valued messages is within the authority of the Interstate Commerce Commission and that the limitations of liability in cases of (1) mistakes, (2) delays, or (3) non-delivery to the amount of toll received for an unrepeated message as expressed in the telegraph blank are valid and binding, as far as applicable to the facts and unless they have been held unreasonable by the Commission itself.

Respondent's first contention involves the application of these regulations to the facts of this case, where there was a total failure to transmit or to attempt to transmit the message and where the petitioner's agents, after pretending to investigate and look through some files, informed the sender that the message had been sent and had been delivered to the respondent in Oakland.

Petitioner contends that this failure on its part is included in the expression "non-delivery".

Respondent's contention is that this expression does not and was never intended by the Commission to include *a total failure to transmit or to attempt to transmit* a message under the conditions disclosed here, and that the provision in question should not be construed beyond its just and reasonable meaning. That if such had been the purpose and intent of the petitioner and the Commission, the word "*non-transmission*" would have been added to the clause.

It is obvious that if petitioner had requested the approval of regulations which included the term "*non-*

*transmission*", it would not have been allowed by the Commission. It must be assumed that the answer would have been that petitioner could not go so far as to absolve itself from liability beyond the toll for the message, for failure to do the very thing for which it was created and which it held itself out to the public as ready and willing to do. While, from the nature of its business, there might be reasonable grounds for condoning, by limitation of liability, mistakes in verbiage, delays or non-delivery of a message, like reasons could not prevail in case of *a total failure to transmit*, accompanied by misrepresentations *that the message had been transmitted and delivered*.

Moreover, it will appear that the regulations in question as they appear upon the telegraph blank have since been held to be *unreasonable* by the Interstate Commerce Commission and the facts upon which such finding of unreasonableness was based have existed unchanged since the regulations were first promulgated, and that this finding is, under the uniformity and equality principle required by the Act to Regulate Commerce, to be interpreted as applying to the enforcement of the rule during the entire period.

The Unrepeated Message Case, *Cultra vs. Western Union Teleg. Co.*, 44 I. C. C. 670, cited and quoted from by petitioner in this Court and the lower Courts, is also reported in 61 I. C. C. 541, after further hearings in the interests of all patrons of telegraph companies who had been or were likely to be affected by the rule,

and not merely in the interests of those who were parties to the proceedings. Attention will hereafter be called to this case more in detail.

Respondent also contends that the rules limiting petitioner's liability as printed on the message in suit, having been held to be unreasonable by the Commission itself, they constitute no defense to the action, and that consequently rules which could have been subjected to still more liberal interpretation to include *non-transmission* would never have received the sanction of the Commission in the first place.

Respondent's further contention is that in this case gross negligence was alleged and proved, and that, as a matter of law, a carrier cannot contract against *willful misconduct* or *gross negligence*.

#### EFFECT OF FILING THE REGULATIONS WITH THE INTERSTATE COMMERCE COMMISSION

At this point we will call attention to the principle that the power of the Courts to interpret the rules of a carrier is not affected by the Act to Regulate Commerce. Rules or regulations which may be enforced in a Court may still be construed by that Court. Under the Act it is the duty of the Commission in the first place, as part of its regulatory and administrative function, legislative in character, to establish, in the interest of uniformity, the tariff and regulations, but after this has been done, it is the duty of the Courts in the exercise of judicial functions to interpret these rules and regulations.

*Great Northern Railway Co. vs. Merchants' Elevator Co.*, 259 U. S. 285.

At page 290, this Court said:

"Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of federal law. If the parties properly preserve their rights, a construction given by any Court, whether it be Federal or State, may ultimately be reviewed by this Court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured."

Again on page 291:

"But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

It is equally true that the legality of a regulation or rate, apart from its reasonableness as a matter of fact, is a matter for determination by the Courts, and although a rule limiting the carrier's liability is filed with the Commission, it is within the power of the Court as a matter of law to decide that the rule is void as against public policy or because the liability cannot be so limited.

*Boston & Maine Railroad vs. Piper*, 246 U. S. 439, at

pages 444-45, is authority in the instant case, because there, as here, the particular clause in the bill of lading limiting liability from unusual delays caused by the carrier's negligence to the amount actually expended by the shipper, was held not within the principle of limiting liability on an agreed valuation which was the basis of a reduced rate, but in contravention of the principle that the carrier may not exonerate itself from losses negligently caused by it. It is therefore peculiarly within the province of the Court in this case to determine whether non-delivery caused by negligence and which is claimed to be the basis of a reduced rate for all classes of messages, includes *a total failure to transmit*, and if so whether or not this clause, so construed, would be valid. It would seem to follow that the subjecting of the entire field of interstate telegraphy to the administrative control of the Interstate Commerce Commission, which is urged by petitioner as a defense, cannot operate to deprive the Courts of the power to construe such provision or pass upon its validity, and thus secure uniformity of operation contemplated by the act.

We therefore respectfully urge that the placing of petitioner's business under the control of the Commission and the filing of its rules and regulations with the Commission, do not operate as a shield to prevent the Courts from passing upon the construction and validity of such rules, especially where it appears that the construction to include *non-transmission* has not

been approved by the Commission nor any classification established whereby, upon payment of a higher rate, the default involved and the resulting damage would be avoided. Moreover, we contend that if the Commission had approved a rule limiting the carrier's liability for *a total failure to transmit*, accompanied by false statements that there had been a transmission and delivery, in other words, a rule exempting the carrier from *gross or wilful negligence* of whatever nature, the Courts would have the power and it would be their duty to declare such regulation void as against public policy, since such regulation would not be a proper or necessary one, based upon administrative or technical matters peculiarly within the province of the Commission, and would be outside the scope and purposes of the Act to Regulate Commerce, which contemplates the establishment of reasonable rules and regulations.

*In Norfolk Southern Railroad Company vs. Chatman*, 244 U. S. 276, the connecting carriers had filed with the Commission as part of their rates, a provision limiting their liability for personal injuries caused by their negligence, when sustained by a person traveling on a "drover's pass", with a shipment of livestock. The shipper was also required to sign this contract. In a suit for damages for injuries received by plaintiff while riding under such contract, this Court held that it had always declared such a limitation of liability void, and that filing such regulation with the Commis-

sion and publication thereof as required by the Act, would not make it valid.

It follows that the placing of the entire business of interstate telegraphy under the administrative control of the Commission by the Act to Regulate Commerce has not affected the power of the Court to determine (1) the proper interpretation of petitioner's rules and whether they apply to the facts of this case, and (2) whether such rules would be valid if construed to limit its liability for *a total failure to transmit or attempt to transmit* the message under circumstances which in this case amount to gross negligence.

The cases cited on page 17 of Petitioner's brief were not cases of *failure to transmit*. It is contended, however, that the *Dickerson* case was. An examination of the facts of that case in 74 So. 780-81, shows that the message delivered to the Postal Company at Tupelo, Mississippi, was to be sent to Gwin, Alabama. The blank of the Postal Company contained the stipulation which had been approved by the Interstate Commerce Commission, that the Postal Company "is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." The Court further found that this stipulation was valid and binding and was part of the contract of transmission, and that the Postal Company

"made diligent effort to send said message over its own line to Guin, Ala., but was unable to do so

by reason of the fact that the Guin office of the defendant company had then, at its regular time, closed for the day, and it therefore became necessary for the defendant company, in an earnest effort to get the message through to destination, to forward the same over the line of another company, which it did by delivering same to the Western Union Telegraph Company, paying the said company 25 cents for transmitting same, which was the same amount received by the defendant for sending the message."

The Western Union Company transmitted the message over its lines, but did not deliver it to plaintiff until about noon the following day. It was this failure of the Postal Company to transmit the message and the delay in delivery by the Western Union Company which was charged to be gross negligence. Obviously that case is clearly distinguishable from the case at bar.

We will not take the time to refer to the cases cited in petitioner's brief involving failure to deliver, because this condition is expressly provided for in the rules and does not, we contend, involve the same degree of negligence as a total and unexplained *failure to transmit* or to *attempt to transmit*. No case is cited in which this failure has been held to be excused by the provisions of the regulations which limit liability only for the following matters:

1. For a delay in transmission.

2. For a mistake or delay in delivery.
3. For the non-delivery of the message.

These regulations do not, therefore, include a *failure to transmit* or to *attempt to transmit*.

Limitations of liability contained in the regulations of a carrier are strictly construed by the Courts against the carrier and what is not plainly conditioned therein will not be included by implication.

In *Texas & Pacific Railway Company vs. Reiss*, 183 U. S. 621, the Court at page 626 says:

"The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the Court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the Court in *National Bank vs. Insurance Company*, 95 U. S. 673, 679: 'Both reasonable and just that its own words should be construed most strongly against itself.' To the same effect is *London Assurance & C. vs.*

*Companhia & C.*, 167 U. S. 149, 159, and *Queen of the Pacific*, 180 U. S. 49, 52."

The same rule was followed in *Royal Insurance Co. vs. Martin*, 192 U. S. 149, 162.

In the article entitled "Telegraphs and Telephones", 37 Cyc. 1686, by one of the distinguished counsel for petitioner in the present case, the rule is thus stated:

"Even where such a stipulation has been held valid, except as against gross negligence or wilful misconduct, it will be strictly construed, and where it specifically mentions only certain grounds of liability, it will not be extended so as to include others not within the terms of the stipulation."

In note 10 are cited several cases holding that total failure to transmit is not within a stipulation against "mistakes or delays in the transmission or delivery or non-delivery", one of which is

*Beatty Lumber Co. vs. Western Union Teleg. Co.*,  
52 W. Va. 410, 44 S. E. 309.

In this case the Court referring to the clause, "To guard against mistakes or delays, the sender of a telegram should order it repeated", says: "This condition has no relevancy, except as to such failure or error as might be cured by repetition; it is only to errors preventable by repetition that such a condition logically applies."

The argument of petitioner is that non-delivery is the same as *non-transmission* because the result is the same. But it is the act of the carrier that is conditioned against, not the result of the act. Where the message has been transmitted but because of some mistake there has been no delivery, the Company has at least made some effort to carry out its duties. This limitation of liability for mistake or delay in delivery or non-delivery or mistake or delay in transmission pre-supposes that some effort has been made to transmit the message. None of these three things mentioned in the stipulation are the same as a *total failure to transmit* or to attempt to transmit a message, since a non-delivery cannot occur where no message was transmitted to deliver, nor can there be any delay in transmitting a message never transmitted at all. Under the rule of strict construction of such provisions, sanctioned by this Court, it is clear that the terms, "delay in transmission" or "non-delivery" cannot be extended to include a *total failure to transmit*.

Many of the cases denominate a total failure to transmit gross negligence, as a matter of law.

No case has been found where the regulations in question were held to excuse gross negligence, but on the contrary the rule has been recognized since the time that telegraph companies first attempted to limit their liability, that they could not do so in cases of gross or wilful negligence. This rule is as well settled

as the rule relating to a person traveling on a "drover's pass", announced in the famous Lockwood case.

The leading case in this country is

*Primrose vs. Western Union Telegraph Company*,  
154 U. S. 1.

That case involved a mistake in the verbiage of a cipher message, *not a failure to transmit*, and the Court held as to such mistakes that the Company could limit its liability.

Beginning on page 17, the Court approves *Birney vs. N. Y. & Wash. Teleg. Co.*, 18 Maryland 341, 358, saying:

"the Court of Appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit."

This Court in that case also approves *United States Teleg. Co. vs. Gildersleeve*, 29 Maryland, 232, and quotes, among other parts of the opinion, the following:

"The appellant could not, by rules and regulations of its own making, protect itself against liability for its own wilful misconduct or gross negligence or any conduct inconsistent with good faith."

This Court also quotes from *Passmore vs. Western Union Teleg. Co.*, 78 Pa. St. 442, 455, where the same

distinction as to gross negligence is recognized, and other cases to the same effect, and this Court on page 27 said:

"The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that there was more than ordinary negligence."

This Court in the case of

*Western Union Teleg. Co. vs. Estere Brothers*, 256 U. S. 566, relied upon and frequently cited in petitioner's brief, interpreting the *Primrose* case, at page 569, said:

"In *Primrose vs. Western Union Telegraph Co.*, 154 U. S. 1, decided in 1894, this classification of rates and limitation upon the Company's liability were declared by this Court to be reasonable and valid, in the absence of *wilful misconduct* or *gross negligence*." (Italics ours.)

The case of *Bowman & Bull Co. vs. Postal Teleg. Co.*, 290 Ill. 155, 124 N. E. 851 (Dec. 1919), was one in which the Supreme Court of Illinois permitted a recovery on the ground that the telegraph company could not limit its liability by conditions on the telegraph blank, against the incorrect transmission of an interstate, unrepeatd message. This doctrine standing by itself is contrary to the rule established by this Court.

However, the Supreme Court of Illinois also said, at page 858 of 124 N. E.:

"Furthermore, we think the evidence here shows a degree of carelessness that amounts to gross negligence, and it is admitted that appellee would be liable for gross negligence."

The operator, in that case, had consciously garbled the message, making five changes in its verbiage, some of which he made because "he thought he was correcting the sender's poor grammar". The Court points out the fact that the operator took liberties in altering the message which he had no right to do, and said: "Such negligence cannot be excused."

In the absence of gross negligence in that case, the decision would clearly be contrary to the decisions of this Court.

On March 1, 1920, this Court denied a petition for a writ of certiorari in the Bowman case, 251 U. S. 562. The only conclusion that can be reached is that the writ was denied because of the presence of gross negligence.

In commenting on this case, counsel for petitioner say, on page 39 of their brief, that there was no valuation clause on the message blank, nor had any such regulation been filed with the Interstate Commerce Commission.

Counsel have inadvertantly overlooked the provisions on the back of the blank, set forth on pages 851-

852 of the Reporter, where the insured and valuation clause and the rates to be charged for such special valuation are set forth, and beginning on page 854, the Court discusses the effect of the Act of 1910 placing interstate telegraph companies within the administrative regulations of the Interstate Commerce Commission.

The case of *Western Union vs. Lange*, 248 Fed. 656 (C. C. A., 9th Cir.) was a case in which the Court upheld a recovery where gross negligence was shown. This Court, in 253 U. S. 101, 110, sets forth the three grounds upon which recovery was allowed:

“(1) That the contract was an option terminable by the buyer’s failure to make the payments required; (2) the oral agreement for the transmission of the message was a binding agreement upon the Western Union Telegraph Company; (3) that under the circumstances the Telegraph Company was guilty of gross negligence in failing to transmit and deliver the message.”

This Court took the position upon the first point that the message in question was an agreement to sell and purchase and not an option, so that the plaintiffs were not damaged by the acts of the company. This was the only ground upon which the case was reversed.

Petitioner realizing, perhaps, the weakness of its position, in contending that the stipulations excused it from the effect of the gross and wilful negligence

shown here, attempted on the second trial to show that the message failed in transmission because of the inadvertence of a capable employee.

It wholly failed to do so because it was not shown that Margaret Brown, who received the message at the desk, had anything whatever to do with the failure to transmit or with placing it in other files of messages which had been sent on some previous day. The deductions of petitioner are based upon the incorrect premise that the inadvertence or negligence, if you will, of Margaret Brown at the receiving office caused the failure to transmit, and they argue, why should there be any greater liability than if the negligence of some employee at the terminal office caused a failure to deliver. They also argue that after the message is once delivered to and accepted by petitioner, it is in interstate commerce, and no rule of the common law as to gross negligence can thereafter apply to the service. Of course, it is only after the petitioner accepts the message that any relation whatever is created between the parties or any responsibility attaches. That argument, carried to its logical conclusion, means that after the message is accepted, the Courts are powerless to afford any remedy to an injured party, regardless of the nature of the act causing the injury, the theory being that the entire business of the petitioner, not part of it, is brought under Federal control, and to permit any common law liability to be enforced would destroy the uniformity contemplated by the

Act. The statement of the position shows its unsoundness. It is not in accord with the construction placed by this Court upon the Act to Regulate Commerce. Even where the Commission has approved a rule as applicable to a given state of facts, which we contend it has not done in case of *non-transmission*, the Court has power to construe such rule or to hold that it is void as against public policy. Where, however, no such rule has been approved, the parties are left to their common law liability to be settled by the Courts.

Many other well considered cases, which fully recognize the validity of the stipulations relating to mistakes or delays in transmission, or delivery and non-delivery, hold that a *total failure to transmit* is gross negligence as a matter of law.

*Pierce Co. vs. Western Union Teleg. Co.* (S. C.)

177 N. Y. Supp. 598, citing on this point

*Weld vs. Postal Teleg. Co.*, 210 N. Y. 59-77, 103 N. E., 957, and many other cases.

In *Birney vs. Printing Co.*, 18 Md. 341, 81 Am. Dec. 607, approved by this Court in the *Primrose* case, 154 U. S. 1, it was held that the exemption from liability for the non-transmission and non-delivery of unrepeatd messages does not apply where no effort was made by the company to send the message. The Court said:

"The terms of the notice in which exemption from liability is declared clearly imply an obligation on the part of the company to attempt the

transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties."

The same rule was followed in *United States Telegraph Co. vs. Wenger*, 55 Penn. St. 262, 93 Am. Dec. 751, where the Court held:

"Telegraph company is guilty of gross negligence and is therefore liable to the sender of the message for such damages as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination."

In *Wann vs. Western Union Telegraph Co.*, 37 Mo. 472, 90 Am. Dec. 395, the Court held:

"Telegraph companies may specially limit their liabilities, but will not be protected from the consequence of gross negligence."

In the recent case of *Freschen vs. Western Union Teleg. Co.*, 189 N. Y. Supp. 649 (April, 1921), at page 654 the Court said:

"From all that appears here the defendant never sent the message received by it from its office. Its failure to deliver is not shown to be due to mistake in transcribing or difficulty in transmitting. All that appears is an absolute failure to perform its duty, unaccompanied by any explanation whatever of the cause of such failure. This, in my opinion, is gross negligence, for the consequences of which defendant is not relieved by the limited liability stipulations."

#### THE FIFTY DOLLAR VALUATION CLAUSE

The same rule applies with equal force to the clause that in any event the company shall not be liable for any mistakes or delays in the transmission or delivery or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise beyond the sum of \$50.00, at which amount the telegram is valued unless a greater valuation is stated in writing thereon and an additional sum paid equal to one-tenth of one per cent thereof.

The case of *Leedy vs. Western Union Teleg. Co.*, 130 Tenn. 547, 172 S. W. 278, involved gross negligence, and the \$50.00 valuation clause was urged as a defense. The Circuit Court gave judgment for plaintiff, which was reversed in the Court of Civil Appeals, and the case was then taken to the Supreme Court of the State. After quoting the \$50.00 valuation clause, the Court said:

"That Court (Civil Appeals) held this stipulation for limitation of liability valid and enforceable and the arguments of counsel of parties in this Court have for the most part been directed to the correctness of that ruling."

On page 279 of the Reporter the Court continues:

"Let it be assumed that the amendatory act of June 18, 1910, operated, notwithstanding the above considerations, to draw this matter to federal authority, exclusive of the states, and so far forth as to render the federal decisions alone applicable on the point of the validity of such a stipulation: Then, even in those jurisdictions where such provisions in telegraph contracts are upheld as valid limitations of liability, it is further held that public policy forbids that they be given operation to relieve the company from liability caused by the gross negligence of the telegraph company's agents and employees. *Weld vs. Postal Telegraph Co.*, 199 N. Y. 88, 92 N. E. 415; *Id.*, 210 N. Y. 59, 103 N. E. 957; *Halsted vs. Postal Telegraph Co.*, 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; *Kiley vs. Western Union Telegraph Co.*, 109 N. Y. 231, 16 N. E. 75; *Wheelock vs. Postal Telegraph Co.*, 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; *U. S. Telegraph Co. vs. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519. And this is the rule in the Federal Courts. *Postal*

Telegraph Co. vs. Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870, 14 Ann. Cas. 369, and federal cases therein cited.

"Gross negligence being found, as above shown, the defendant company cannot invoke the stipulation for its protection.

"If it could not do so in the Federal Courts, it would seem that there is no virtue left in its main contention before us."

The Oklahoma case cited on page 27 of petitioner's brief did not involve any question of gross negligence.

This is also true of the cases cited on page 28.

In the instant case, the finding of gross or wilful negligence, which practically amounted to fraud, or that entire want of care which would raise the presumption of a conscious indifference to consequences, is amply sustained by the testimony.

In addition to the total unexplained *failure to transmit* or to attempt to transmit the message, the importance of which appeared on its face, the petitioner's agents, after looking through some files, informed the sender that the message had been sent and on a subsequent occasion they again informed him, after looking through some more files, that it had been sent and delivered to respondent at Oakland, whereas such statements were absolutely false and a proper examination of its records must have disclosed that fact. The making of this false statement to the sender, who was acting as re-

spondent's agent in making the sale to Miller, misled him to such an extent that he considered it unnecessary to send respondent another message or attempt to further communicate with him, and he testified that in view of these statements he thought respondent might be on his way to Boise with his bank stock. (Tr. p. 64.)

The distinction between a valuation clause as found in express company regulations or the tariffs of carriers of freight and the valuation clause on the telegraph blank is obvious and certain. When a package containing a diamond ring, for example, is shipped, it has a definite value when shipment is made, and the shipper may value it at a sufficient amount to cover any loss in transit. This is true of any other commodity. It is a proper rule which estops a shipper who has declared a lower value and paid a lower rate from claiming greater damages.

A telegram, however, is not capable of being valued. The information to be conveyed thereby may be worth large sums at one minute and be valueless at another. It has no market value. Consequently no value can be declared. The theory is that the sender should declare as the value what his loss would amount to if an error or delay occurs in transmission, or delivery or non-delivery occurs, but how can he tell what loss will occur?

It is impossible for him to tell in advance what value to place on a telegram, which, in itself, has no value,

or the amount of the loss if an error is made, or if there is a total failure to transmit.

This valuation clause is not supported by the same reasons as apply to that in similar rules of carriers of goods. If a valuation cannot be made when the message is sent, an arbitrary valuation fixed by respondent should not be enforced after the loss occurs. The most that can be said of this clause is that it limits a recovery for ordinary negligence to \$50.00, and no federal case has been found where such a clause has been held to limit recovery to \$50.00 where there has been a *total failure to transmit*, under the circumstances disclosed here. In the opinion of the Court of Appeals (Tr. pp. 170-71) the principle governing this question is clearly, and, we think, correctly stated.

As before pointed out, the rule announced by this Court is that, even if these regulations attempted to include gross negligence, or wilful failure of duty in their phraseology, since public policy forbids such limitation, the courts have the power to declare such regulations void, although they had been approved by the Commission. It is not so much, then, a question, as far as gross negligence is concerned, of what is included in the language of the rule, as it is whether such limitations are lawful.

The Court of Appeals of New York in *Weld vs. Postal Telegraph Co.*, 199 N. Y. 88, 92 N. E. 415, at page 418, clearly shows the basis of this rule with respect to telegraph companies. The Court said:

"The liability of telegraph companies in respect of the business which they carry on is regulated by two things: 1. By contract. 2. By the nature of their quasi-public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with a degree of care and diligence adequate to the business which they undertake. The liability which a telegraph company assumes under this general rule may, however, be limited by special contract, and that is today the universal practice. As it is a business requiring employes of peculiar skill, so it is also subject to atmospheric and physical disturbances which may set at naught the greatest care and skill. It is, therefore, but right that telegraph companies should have the power to limit their liability in cases where mistakes occur through no fault on their part, or for such mistakes of their employes as will occur through ordinary negligence, in spite of the most stringent regulations or the most vigilant general oversight. But manifestly this power cannot be extended further without placing the public absolutely at the mercy of those engaged in transmitting telegraphic messages. This is the *reason* of the rule, long since established in this state, that individuals and corporations engaged in this quasi-public business cannot contract to absolve them-

selves from liability for their own wilful misconduct or gross negligence. They may protect themselves by contractual limitations that are reasonable, but beyond that they may not go. That is the law as laid down by this Court in a number of cases."

The Court, after citing many of its decisions, continues:

"The cases cited all hold that a regulation limiting the liability of a telegraph company for a mistake in an 'unrepeated' message to the price paid for sending it is reasonable, but that it does not relieve such a company against the consequences of its gross negligence."

In *Lothian vs. Western Union Teleg. Co.*, 25 S. D. 319, 126 N. W. 621, at page 622, the Court said:

"Assuming its obligations as a common carrier may be limited by a special contract, defendant cannot be exonerated by any agreement made in anticipation thereof, from liability for the gross negligence, fraud or wilful wrong of itself or its servants." (Citing cases.)

The Court in this case defines gross negligence as "the want of slight care and diligence", citing 29 Cyc. 423.

This Court, defining it with reference to a gratuitous bailee, said:

"But gross negligence is nothing more than a failure to bestow the care which the property in its situation demands."

*Preston vs. Prather*, 137 U. S. 604, 608-9.

With reference to the negligence of a carrier, this Court, in *Milwaukee R. Co. vs. Arms*, 91 U. S. 489, pointed out the difficulty of defining "gross negligence" in all cases, but stated that, to visit the company with damages beyond the limit of compensation for the injury actually inflicted,

"there must be some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

In the instant case, although no exemplary damages are claimed, the acts of petitioner's agents in relation to this message can be considered in no other light than wilful and conscious indifference to consequences. The unexplained failure to transmit and the statements, after pretending to look through the files, that the message had been sent, and also that it had been sent and delivered to respondent at Oakland, can raise no other presumption than wilful and conscious indifference to consequences.

EFFECT OF THE DECISION OF THE INTER-  
STATE COMMERCE COMMISSION IN THE  
UNREPEATED MESSAGE CASE (Also known as  
the *Cultra Case* and the *Clay Produce Case*).

This case, which is also entitled *Clay County Produce Co. vs. Western Union Telegraph Company*, was finally decided May 3, 1921, 61 I. C. C. 541, after the decision of this Court in *Postal Telegraph & Cable Co. vs. Warren-Godwin Lumber Co.*, 251 U. S. 27, decided December 8, 1919, and after the decision in *Western Union Telegraph Co. vs. Boegli*, 251 U. S. 315, which was decided January 12, 1920.

The case of *Western Union Telegraph Co. vs. Estere Bros. Co.*, 256 U. S. 566, was argued on April 12th and 13th, 1921, before the *Cultra Case* was decided. The decision in the *Estere Case* was June 1, 1921. This Court cited the first report of the *Cultra Case* in the *Warren-Godwin* and *Estere Bros. Cases*, but the final decision in the *Cultra Case* was, of course, not before this Court in either of those cases.

The first report of the *Cultra Case* was also read by counsel for petitioner in the present case at the trials in the District Court and in the Circuit Court of Appeals and was used as authority on the legal questions involved. It is also cited and quoted from the Court of Appeals in its first opinion in this case. It is also cited as authority in several places in petitioner's brief in this Court.

We are therefore making further reference to that case as authority on the questions of law involved.

The facts in *Cultra vs. Western Union Teleg. Co.*, are shown in the *Unrepeated Message Case*, 44 Interstate Commerce Reports, 670. That report shows that on March 21, 1914, plaintiff sent a night letter which defendant transmitted incorrectly. The following is quoted from the report:

"To recover damages for the loss so incurred the complainants brought their action against the defendant in the Circuit Court of Jackson county, in the State of Missouri. The defense there interposed by the telegraph company was (a) that the Court, by the terms of the contract under which the message was sent, was limited to an award of nominal damages only, even though the loss claimed was shown to have resulted from the defendant's negligence in forwarding the message; and (b) that the validity of the provisions in the contract restricting the defendant's liability to nominal damages was not within the competency of the State Court to deny, but was a Federal question which the Interstate Commerce Commission alone was authorized by law to consider and deal with. In the light of that contention, the Trial Court is holding the case in abeyance pending a ruling by this Commission. The questions presented for our consideration, as stated by the complainants, are in substance as follows: (a)

Whether the Congress, by the act of June 18, 1910, amending the act to regulate commerce, has vested in this Commission such jurisdiction over the rates and practices of telegraph companies as to bring under our control and within our regulating power the rules of such companies concerning their liability for damages incurred by reason of error or delay in the transmission or delivery of interstate messages; and (b) whether, if the Commission has such jurisdiction, *the present rules* of the defendant telegraph company, with respect to these matters, are *reasonable*, and, as the complainants put the inquiry, whether they are *consistent with a sound public policy*." (Our italics.)

The first question was decided in the affirmative, but the second question was only partially decided in that opinion, and this matter was held open for further investigation, as is shown by the subsequent report of the same case in 61 I. C. C. Reports, 541, where the Commission on page 544, said:

"The Unrepeated Message Case was decided May 17, 1917. By it common carriers engaged in the transmission of messages were appraised as to what, in our opinion, their practices should be in the settlement of damage claims arising through defaults in service. In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message

Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing. Further hearing was had on February 20, 1918. On August 1, 1918, the President, under powers conferred upon him by Congress, assumed possession and control of the defendant company and appointed the Postmaster General his agent to continue its operation. Control of the property remained in the hands of the government until August 1, 1919, and consideration of the evidence taken at the hearing of February 20, 1918, was held in abeyance during that period. Thereafter, on March 1, 1920, a further hearing was had for the purpose of ascertaining whether changes had been made in the practices of the company since the date of the former hearing, and also to afford an opportunity to parties interested to present to us any new facts bearing on *the propriety of the rules*. At this later hearing petitions in intervention were filed on behalf of various stock, cotton, and grain exchanges and other associations. In the interest of uniformity the general investigation was subsequently instituted."

In this decision, which was handed down on May 3, 1921, the Commission finally disposed of the matter left undetermined in the first report of the case.

The practices of petitioner, which tended to discredit the rules and classifications themselves, together with defects inherent therein, were pointed out on page 547, where the Commission said:

"In considering the reasonableness of the rule limiting liability in the case of an unrepeatd message to the amount of the toll received for sending it, the *evidential effect* of the voluntary practices of the Western Union, which handles 75 per cent or more of the telegraph business of the country, cannot well be overlooked. Prior to 1910 that rule was never observed, and all claims for damages were referred to and dealt with by the legal department without reference to its limited liability. Following the amendment of 1910 the conclusion was reached that thereafter there could be no latitude in the adjustment of claims, but that settlement would necessarily be made on a standard basis under fixed rules determined by the laws of the different states or the Federal laws. Under date of May 8, 1911, authority was granted the general superintendents to settle all claims up to \$500 when damage resulted from a fault in service and there was no valid contract limiting the company's liability. The superintendents were instructed to disregard the unrepeatd message condition, except in the case of claims arising or based on messages handled solely in New York, Massachusetts, California, or Rhode Island, where

the validity of the stipulation was upheld except in the event of gross negligence. In 1913 the policy was altered and claims were thereafter settled according to the discretion of the superintendents or managers. Since then adherence to the contractual limitations has not been required."

On page 548:

"A repeated telegram differs from the ordinary telegram in that it is repeated back at each stage of transmission from point of origin to destination. This class of message is seldom used, an operator testifying that in 17 or 18 years' experience he had transmitted perhaps 200 such messages. Repetition of a message is a certain guard against errors in transmission, but is no protection against delayed delivery. To many patrons of the telegraph service a delay may have as serious consequences as a mistake in transmission, particularly in the case of commercial telegrams between members of boards of trade and exchanges."

On page 549:

"The valued message appears to be of no practical use in the great majority of instances, because of the impossibility of anticipating what default, if any, there may be in the service and thus determining in advance what loss may ensue. So far as a large proportion of the public is con-

cerned this class of messages might be eliminated, as it never has been and probably never will be used to any considerable extent. If a valued message should be sent it would be handled in precisely the same manner as a repeated message; that is, repeated back at each stage of transmission, with extra care exercised in delivery. This class of message, however, is of importance to the carriers in that it places a limit upon unforeseen and unanticipated losses; and the contention pressed upon our notice, that senders can not well anticipate the results of defaults in the service, is at least no less true of the telegraph companies.

“The present record amply demonstrates the need for a substantial revision of respondents’ rules concerning their liability on interstate messages. *All other common carriers* subject to the act have been made *fully liable* for their *errors or negligence*, notwithstanding attempted limitations by contracts, rules, or otherwise, except in instances where they have been expressly authorized by this Commission to maintain varying rates dependent upon the declared or agreed value of the article transported; and the record herein offers no sound reason why telegraph companies should longer be permitted to avoid liability for their errors or negligence or to limit it to the nominal amounts now provided for in their rules. It has been shown that these rules are not observed

by the Western Union, but that, on the contrary, meritorious claims arising in connection with un-repeated messages are adjusted either to the full extent of the loss suffered or on a basis satisfactory to the claimant."

The conclusion on this question is stated at page 550:

"Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of *unrepeated* and *repeated* interstate messages *are* and for the future will be *unreasonable*."

At the time the message in the present case was accepted by the petitioner on November 30, 1917, the latter was a defendant in the case above referred to and at the time this action was commenced on June 13, 1919, the Commission had under investigation and advisement the reasonableness of the regulations in question here, and eventually on May 3, 1921, decided those rates to be unreasonable.

It appears, therefore, that at the time the message was delivered to petitioner on November 30, 1917, the question of the reasonableness of the regulations was before the Commission. Its decision of that question was judicial in its nature, and hence was effective on the date the message in suit was tendered for transmission, in exactly the same manner as if made by a Court.

This decision of the Commission is pointed out for two purposes:

First, it seems to us that it is persuasive authority as a matter of law as to the unreasonableness of the regulations in question, especially in the event they are construed to embrace the *total failure to transmit* or to include gross or wilful negligence, and that consequently they are no defense; and second, under the reparation principle established by this Court, this ruling of the Commission as to the unreasonableness of the regulation as set forth in the last paragraph quoted, although expressed in the present sense, has a retroactive effect, where it appears that this finding of the Commission is not based upon any temporary or changeable condition existing at the time, but upon what inhered in the rule, and therefore was true at the time of its adoption, and at the time the message in suit was delivered to petitioner. That it operates to discredit the rule as respects earlier transactions.

The case of *Pennsylvania R. R. vs. Stineman Coal Company*, 242 U. S. 299, is, we submit, directly in point and very similar as to the facts, and is authority on this point.

It is clear from an examination of the report of the Commission that it is within the principle of the Stineman case because the operation of the rules in question ~~were~~<sup>are</sup> under investigation since the passage of the act of 1910 placing telegraph companies under Federal control, and the Commission based its finding of unreason-

ableness solely upon the practices of the petitioner here, and the defects inherent in the rules themselves.

The exact language of the order is not quoted in the *Stineman Case*, but it is found in *Penn. R. Co. vs. Interstate Commerce Commission*, 193 Fed. 81, at page 82, which was a suit before the Commerce Court to enjoin its enforcement. It reads in the present tense: "It is ordered that said rule \* \* \* unduly discriminates \* \* \* and is in violation of the third section \* \* \*."

"It is further ordered that the defendant be, and is hereby notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations \* \* \*."

In construing the finding of the Commission, this Court, after referring to the granting of reparations, on page 302 said:

"Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

"In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure."

This case, we submit, is authority on the point that the decision of the Commission as to the unreasonableness of the rules in question applies to such rules from the inception of the investigation, which was prior to the time the message in question was delivered to the petitioner.

The rule was also announced in the earlier case of *Phillips vs. Grand Trunk Ry.*, 236 U. S. 662, at page 665, where the Court held that the proceeding before the Commission was not in the nature of private litigation between the parties, but a matter of public concern in which the whole body of shippers were interested and that the findings inured to the benefit of every person who had been obliged to pay the unjust rate. Otherwise, the immediate parties to the litigation would secure an advantage over the general body of the public.

The plaintiffs in the *Cultra Case* in the State Court of Mississippi, which was being held in abeyance pending the decision by the Commission above cited, were undoubtedly permitted to recover in that case, since the rules set up in defense were declared unreasonable, and

it would seem that in the interest of the uniformity and equality of treatment which the Act to Regulate Commerce is intended to secure, respondent cannot be denied a like recovery.

### THE SIXTY-DAY CLAUSE FOR PRESENTING CLAIMS

On this question respondent respectfully presents the following points for consideration:

1. The provision in question will not relieve the Company from liability for its wilful and gross negligence.
2. There is no provision in the rules of the Company requiring the presentation of a claim for damages in writing within any specified time after the party injured first learns of the Company's default. Consequently the only requirement in such case is that the claim be presented within a reasonable time thereafter within the rules of the Common Law. This was done in this case.
3. The time and manner in which respondent presented the claim were expressly sanctioned by the Company, and the latter waived its presentation otherwise. The Company had full notice and knowledge of the damages claimed immediately after respondent first learned of it and proceeded to investigate the merits of the claim and promised in writing to communicate with respondent at the conclusion of its investigation, and the claim in writing of June 18, 1918, was sent to

the Company at the request of its manager, as respondent had waited a reasonable time without hearing further from the Company.

The Trial Court held that, as applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have to be held unreasonable for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time (Tr. p. 156).

The message was delivered to the Company November 30, 1917, but respondent had no knowledge whatever of such a message until his return to Boise from California about February 14, 1918.

He and Mr. Jones, the sender, at once called on Mr. Hackett, the General Manager of petitioner's office at Boise. Mr. Hackett informed them that he would look it up, and later handed the respondent the telegram. On February 14, 1918, Mr. Hackett sent a letter to Mr. Jones, which is set forth on page 68 of the transcript, in which he acknowledged that the message failed in transmission and he enclosed a check for the amount of the tolls paid on the message. Mr. Jones replied to this letter on February 18th, returning the check on the ground that an acceptance on his part *might be construed as a settlement of the matter.* (Tr. p. 69.)

After the receipt of this letter Mr. Hackett called

on Mr. Jones at the latter's office and said, "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." He said further, "It is unfortunate that it didn't go through, and the Company will settle it." "There is no question about their liability." (Tr. p. 70.) He also said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered, isn't that correct?" to which Mr. Jones answered, "Yes." He asked Jones what the stock was worth and Jones referred him to Mr. Streeter, the Cashier. Mr. Hackett said further, "I would like for you (meaning Jones) to fix the value, as I think you would be fair. *I have taken this matter up with the Company.*" (Tr. p. 73.)

Respondent at that time received a communication from some official or attorney for the Company from Salt Lake (Tr. p. 81). Afterwards, *at the request of Mr. Hackett*, respondent addressed a communication to the defendant Company and Mr. Hackett, the manager, in which he set forth as well as he could the facts in the case, and the latter sent it on to Salt Lake. This was dated June 18th, 1918, and is set forth at page 83 of the transcript. Respondent received a reply from Mr. Hackett acknowledging its receipt and stating that he had forwarded the same to the Company for consideration and making inquiry as to the value of the stock at that time, or at the time when respondent first discovered the message had not been sent, about

the middle of February when he returned to Boise. (Tr. p. 87.)

Under date of July 2nd, 1918, respondent received a letter from U. G. Life, District Commercial Superintendent of the Company at Salt Lake. This letter acknowledged receipt of the claim and advised that this matter had been taken under *immediate investigation*, upon the conclusion of which *respondent would be communicated with further*. It concludes with this paragraph:

"However, more than sixty days have elapsed since date claim message was filed, our investigation will be conducted without prejudice to the situation created by your failure to bring matter to our attention at an earlier date." (Tr. p. 86.)

Respondent, after waiting a reasonable time and hearing nothing from the Company, commenced this action.

It is obvious that the sixty-day clause was not framed in contemplation of a situation in which the party injured could have no knowledge of the default for a period of more than sixty days after the telegram is filed with the Company for transmission. It amounts in this respect simply to lack of foresight on the part of the Company. Ordinary bills of lading of carriers usually contain the further provision that the claim must be filed within a certain time after shipper first learns of the loss or damage. It certainly is not a rea-

sonable contention that this provision should be construed to include a condition of facts not embraced within its terms.

We think the rule which applies, in the absence of any provision covering the facts in this case, is that the matter should be brought to the attention of the Company within a reasonable time after the person injured first learns of the default. It is reasonable and proper that this should be done to facilitate prompt investigation. When, however, the matter has been taken up by the officials for investigation, it is not incumbent upon the injured party to take any further steps until the Company refuses to settle the claim. This is especially true where, as in this case, the official of the Company promised to communicate with the respondent upon the conclusion of the investigation.

Considerable stress was laid upon the concluding paragraph of Mr. Life's letter, quoted above. Mr. Life interpreted the clause, as does counsel for petitioner, to mean nothing more than that the claim must be filed within the sixty days *from date message was filed*, which was impossible in this case. His statement that the investigation would be conducted without prejudice to the situation created by plaintiff's failure to bring the matter to their attention at an earlier date may be reasonably construed in view of the situation at that time, to mean that he would investigate the matter regardless of the sixty-day clause, and at the conclusion of the investigation communicate further with the

respondent. If he intended to ultimately urge this defense, what was the need of investigating at all? Fairness and good faith would seem to require of him that he either investigate the matter, and if he found the Company at fault, recommend a settlement, or notify respondent at once that he considered the claim barred by the sixty-day clause so that respondent could take such further action as he might desire.

It is a significant fact that he did not take the position now taken by petitioner that under the Interstate Commerce Act, the company could not waive this provision, and that consequently liability must be denied, but he took the position that the claim would be investigated on its merits and respondent communicated with further.

The statement in the letter with reference to the failure of respondent to bring the matter to their attention at an earlier date is untrue and self-serving, as the evidence conclusively shows that it was brought to their attention as soon as plaintiff learned of it and it had been under investigation since that time.

If Mr. Life intended in his letter to convey the meaning claimed for it, he should have made his meaning clear by a simple statement that their investigation would be conducted without waiving their right under that clause of the message blank.

It will be observed that while the business of telegraph companies has been brought within certain provisions of the Interstate Commerce Act, this case is

not governed by the provisions of this Act which relate to the liability of passengers and freight and providing the time within which claims for damages or misdelivery must be presented and suit thereon commenced, known as the Carmack Amendment, 24 Stat. L. 379, as amended by the Act of June 29, 1906, 34 Stat. 593, and the decisions of this Court under that portion of the Act cited by petitioner have no application to this case.

The case of *Georgia, Etc. Railway Company vs. Blish Milling Company*, 241 U. S. 190, cited by petitioner, is authority for respondent on the general question of the construction of a provision requiring notice. The Court, at page 198, gives a very liberal construction to such requirements, stating that the objects of such a stipulation are to secure reasonable notice and apprise the carrier of the character of the claim, and that no formal notice in writing is required but that a telegram may be sufficient for that purpose.

In this case the letter of Jones returning the check for the toll sufficiently apprised the manager that a claim would be made and pursuant to that letter the manager discussed the matter with Jones and asked him if the measure of damages would not be the difference between the amount which Miller would have paid for the stock, or ninety dollars per share, and the value of the stock at that time, if it had any value, to which Jones replied in the affirmative.

The finding was that the bank having gone into

liquidation, the stock was valueless. It is plain that no prejudice resulted to petitioner by reason of the fact that no formal claim was presented at an earlier date, since petitioner was sufficiently advised of all of the facts.

Under the rules of the common law, there was a clear waiver on the part of petitioner of any further notice than the ones received by it.

The case of *Wheelock vs. Postal Cable Company*, 196 Mass 119, 83 N. E. 313, 314-15, is very similar to this case as to the facts relating to waiver. The provisions of the telegraph blank were the same as those in this case. The telegram was never received by the addressee and the plaintiffs had no knowledge of this fact until about six weeks after it was delivered to the Company for transmission and did not file their claim within sixty days from the date the telegram was filed by the Company. When the plaintiffs learned that the telegram had not been delivered, the matter was taken up with the local manager of the defendant's office. Similar negotiations took place as to those in this case. Investigation was promised with the statement that they would communicate further with the plaintiffs. No further communication was received from the Company for over three months after the telegram had been filed for transmission. Plaintiffs then sent defendant a written claim for damages.

The Court first considered the stipulation requiring the claim to be presented in writing within sixty days

after the filing of the message, and held that such a stipulation is a reasonable provision for the protection of the Company against stale claims and for securing an opportunity to investigate the same before the facts pass out of the memory of those who ought to know them.

The Court held, however, that this requirement could be and was waived by the defendant. The Court said:

“There was a series of communications between the parties touching the subject, in all of which, from first to last, the defendant discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant’s conduct in regard to it was such as naturally to throw the plaintiff’s off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the sixty days had expired. We think they naturally might infer from the defendant’s conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or technical defense, founded on the time or manner of presenting the claim.”

In *Western Union Teleg. Co. vs. Heathcoat*, 149 Ala.

423, 43 So. 117, the Court, on this point, on page 120 said:

"While the defendant was entitled to have the claim for damages presented in writing within 60 days after the message was delivered for transmission, we think there is no doubt that the right is a limitation for the benefit of the defendant, is of its own creation, and may be waived by it, and the waiver may rest in parol. 27 Am. & Eng. Ency. Law (2d Ed.), p. 1049; *Hill vs. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; 1 Elliott on Ev. 596."

The Court also held that the local agent in charge of the Company's office at Birmingham had authority to waive presentation of a formal claim in writing, although this agent testified that he had no authority to waive any rules or regulations on the back of the blanks. The Court held, however, that he was a general agent authorized to transact generally the telegraphic business at Birmingham, and that there was no evidence tending to show that plaintiff knew of any limitations imposed by the Company upon his authority and that the Company would be bound by his acts in that respect.

In the case of *Hill vs. Western Union Teleg. Co.*, 85 Ga. 425, 11 S. E. 874, the Court held that in ordinary cases the provision relating to the presentation of the claim in writing within 60 days is reasonable and valid, and also held:

"The agent or manager of the company on duty at the station from which the message is sent is a proper person upon whom to make demand for the damages claimed, and he is competent to recognize and act upon an oral demand and thus waive any writing. Such a waiver will result from his refusal to pay upon the sole ground that the company was not to blame."

In *Western Union Teleg. Co. vs Stratemeier*, 6 Ind. App. 125, 32 N. E. 871, the Court, on the question of waiver, on page 872, said:

"The condition in the contract requiring the claim for damages to be presented in writing within 60 days is reasonable and valid, and is a condition precedent to a right to recover; but like all other conditions, the breach of which may defeat substantial rights, it should be strictly construed, and is subject to be waived. That condition was evidently designed to furnish appellant with reliable information respecting the claim for damages, to enable it to investigate the subject while the facts were fresh and readily accessible; and it had the unquestioned right to insist upon the literal fulfillment of the condition before giving attention to the claim. *Telegraph Co. vs Trumbull*, 1 Ind. App. 121, 27 N. E. Rep. 313. But it appears from the pleading under consideration that appellant acted upon an oral presentation of the claim, and

investigated the matter. Upon such presentation, it entered into a correspondence with appellee concerning the claim, and offered him money in settlement of his damages; thus recognizing a liability without demanding of him the performance of the condition. Having entered upon the investigation of the claim upon appellee's oral complaint, he might well have presumed appellant would ask him for further and more accurate information, if it had been desired."

In *Hays & Bros. vs. Western Union Teleg. Co.*, 70 S. C. 16, 48 S. E. 608, the Court held:

"Where a blank used in sending telegrams provides that a claim for damages must be made in writing within 60 days, a waiver of the condition may be shown by acts of the company's agent in accepting verbal statements as to damage, and seeking information of plaintiffs as to the merits of their claim, within the time limited by the blank."

In *Western Union Teleg. Co. vs. Fitts*, 13 Ga. App. 248, 79 S. E. 156, the Court held:

"The evidence was sufficient to show a waiver of the condition of the contract printed upon the telegraph blank, which requires the claim for damages to be presented in writing. The testimony that the telegraph company received an oral de-

mand, and within a week after the message was sent, acted upon it and investigated the claim, is undisputed.

"And though the agent is not bound to recognize an oral demand, if he does so, making no objection upon the ground that it is not in writing, a waiver of the written demand will result."

The Court further held that after this waiver:

"The company was not restored to its original right to insist upon a written claim for damages merely because, after the expiration of the 60 days, the sender's attorney transmitted to the telegraph company a claim in writing in which the damages were specifically set forth and enumerated."

In the case of *Insurance Co. vs. Norton*, 96 U. S. 234, this Court held:

"An insurance company may waive any condition of a policy inserted therein for its benefit.

"As the company may at any time at its option give authority to its agents to make agreements or to waive forfeiture, it is not bound to act upon the declaration in its policy that they have no such authority."

"Whether it has or has not exercised that option is a fact provable by either written evidence or by parol."

In the case of *Insurance Co. vs. Eggleston*, 96 U. S. 572, 577, the Court said:

"We have recently, in the case of *Insurance Co. vs. Norton* (supra, p. 234), shown that forfeitures are not favored in the law, and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

The same ruling was followed in

*Hartford Life Insurance Co. vs. Unsell*, 144 U. S. 439,

and by the Circuit Court of Appeals of the Fifth Circuit in

*Talbot vs. Metropolitan Life Insurance Co.*, 142 Fed. 694.

*McCullough vs. Home Ins. Co.*, 155 Cal. 659; 102 Pac. 914.

*Fireman's Fund Ins. Co. vs. Norwood* (C. C. A. 8th Cir.), 69 Fed. 71.

This clause should receive the same strict construction against petitioner accorded by this Court to bills of lading, because it is of the Company's creation, and nothing should be added to it by implication. Also because it involves a forfeiture of respondent's rights.

Consequently it should not be construed to embrace a provision that notice must be given within sixty days after the person filing the telegram or for whose benefit it is filed, first learns of the failure. If such a clause had been contained in the stipulation, it might reasonably be contended that the Company, in the interest of uniformity, had no right to waive it.

Here, however, there is no such clause, hence the rule cannot apply, and there is no room for construction of language which does not exist.

THE SHOWING THAT IF THE MESSAGE HAD BEEN TRANSMITTED AND RECEIVED BY RESPONDENT, HE WOULD HAVE BEEN PAID \$4500 FOR HIS STOCK, IS SUFFICIENT TO SUSTAIN THE JUDGMENT FOR DAMAGES IN THAT SUM.

The cases cited and quoted from on pages 51 et. seq. of petitioner's brief are wholly different in principle from the instant case. They involved the question of remote, speculative or contingent profits, which might have been made either by the sender or sendee of the

message, if it had either been delivered in time and before change in the market, or if its verbiage had not been changed.

Thus in *Hall vs. Western Union*, 59 Fla. 275, Hall was a broker engaged in buying and selling to commission houses fruits, vegetables and produce. He sent, through defendant, several telegrams to different commission houses offering to sell them certain produce at certain prices "if quick". He had not yet purchased these commodities, but his purchase of them in the market was contingent upon the sales to the commission houses. He prepaid the telegram but through negligence the defendant telegraph company sent them all collect. By reason of this fact the commission houses refused to answer the telegrams or do any further business with Hall. Hall claimed damages, contending that if the messages had been sent as paid messages the commission houses would have accepted the offer and he would have bought the produce and resold it to them at a reasonable profit. He also claimed damages to his reputation and for loss of time in waiting for replies which never came.

The Court, at page 642 of 27 L. R. A. (N. S.) said:

"It may be conceded that, if damage proximately resulted to the plaintiff from the defendant's act in sending the messages collect when they had been prepaid, a recovery may be had as in another delict."

“\* \* \* yet it cannot be said that the improper transmission of the messages proximately caused the special losses alleged, since the messages were merely offers to sell property that had not been purchased, but by the purchase and sale of which the plaintiff expected to make a reasonable profit if the offers were accepted.

“The offers were not accepted, and it does not appear that it can be proven with any degree of certainty that the failure to accept was caused by the fact that the messages were sent collect. If the messages relate to important business transactions, and the addressees desired to accept the offers made, it does not seem reasonable that the offers were not accepted merely because the messages were not sent prepaid.”

The *Richmond Hosiery Mills Case* decided by the Supreme Court of Georgia and also reported in 51 S. E. 290, was an action for damages for loss sustained by a rise in the market price of yarns because of a mistake in the verbiage of a message where December was substituted for October delivery. It was also for damages for loss of trade and because the plaintiff factory by reason of losing the chance to purchase the yarn for October delivery had to curtail its production and discharge a large number of hands.

Lumpkin, Justice, in delivering the opinion, held that such damages were too remote and speculative. He also said:

"While there is some conflict in the authorities, the more satisfactory line holds that 'compensatory damages cannot be recovered of a telegraph company for failure to send or deliver a mere proposal to sell \* \* \* as they are contingent upon its acceptance'."

The Court cites all of the following cases cited in petitioner's brief on this point, except the Kiley case in 39 Hun, in support of this proposition.

In the *Beatty Lumber Company Case*, this company, plaintiff in the action, delivered a telegram for transmission in answer to one received, the message reading:

"Can deliver the four-sixteen stringers at Buffalo in 30 days for twenty-one sixty per 1000 feet. Commence shipping in five days."

The defendant negligently omitted to transmit or deliver the message. After holding that the conditions on the blank did not excuse the gross negligence shown, the Court considers the question of damages and first announces the rule relating to compensatory damages as in the Georgia case.

The Court further held that the proper measure of damages was not the difference between the cost of the lumber delivered at the point of delivery and the fixed price, but the difference between such price and its market value at the time when delivery would have been made if the contract had been consummated. In

that case the damage was nothing, because lumber continued to go up after the message was delivered to the defendant and the Court said plaintiff was actually better off because of the failure to transmit, because it is to be presumed that it could have sold the lumber on the market for a higher price.

The case of *Western Union Teleg. Co. vs. Hall*, 124 U. S. 444, also cited by petitioner, clearly shows the distinction.

The message was: "Buy ten thousand if you think it safe. Wire me." It referred to 10,000 barrels of petroleum. Had it been delivered on time the purchase would have been made at \$1.17 per barrel. On the date of the delayed delivery of the message the price had risen to \$1.35 and no purchase was made. Plaintiff was buying on speculation, but there was no evidence whether he would have resold it on the following day or at what time or how long he would have waited on the rising market. The Court held that plaintiff could only recover nominal damages, because the only theory upon which plaintiff could show actual loss was on the supposition that, if he had bought on the 9th of November he might and would have sold on the 10th. That in point of fact, plaintiff had suffered no loss through defendant's acts because no transaction was in fact made and the loss claimed was purely contingent. This suffices to show the principles announced in the cases cited.

The damages involved in the instant case do not

involve remote, speculative or contingent profits, or any loss of profits at all. If Miller were suing the telegraph company claiming that, if he had purchased the stock at \$90.00 per share he might have resold it at a higher price, or for damages because by failing to get respondent's stock the merger of the bank fell through, whereby he was damaged, the cases cited might be applicable.

Here, however, the message, irrespective of the manner in which it was worded, was sent, to carry out a sale of this stock to Miller, which had practically been consummated except as to the delivery of the Czizek and Jones stock, prior to the departure of Czizek for California. The following language of the Circuit Court of Appeals (Tr. 172) is fully sustained by the evidence.

"The meaning and import of the message were perfectly plain on the face of the paper; hence, cases where cipher messages were involved are not controlling. Czizek's testimony is positive, and the circumstances sustain it, that he would have sold the stock at the price offered in the message that was not transmitted and the evidence is that he would have been paid the price offered; but a few days afterward, because of the failure of the bank, the stock became practically worthless. Under the facts, the difference between what he was offered and would have accepted and the value of the stock at about the time he called

upon the manager at Boise is the measure of the damage. *U. S. Teleg. Co. vs. Wenger*, 55 Penn. St. 262; *Harron vs. W. U. Teleg. Co.* (Iowa), 57 N. W. 696."

It is apparent that in practically every action for damages, where injury is caused by delays, mistakes in verbiage, or non-transmission on the part of the telegraph company, the very nature of the message presupposes that some act would have been performed by the sendee, or by some third person, as otherwise the negligence of the telegraph company would not cause any injury.

In an extended note to *Western Union Teleg. Co. vs. Caldwell*, 126 Ky. 42, 102 S. W. 840, beginning on page 748 of 12 L. R. A. (N. S.), the author refers to a long line of cases from the different state and Federal Courts which

"sustained judgments against telegraph companies for failure promptly to transmit and deliver telegrams, although any benefit to be received from the telegram, if properly transmitted and delivered, was dependent upon the contingency of some possible action on the part of the sendee or some third person."

In the principal case the Kentucky Court of Appeals, in permitting a recovery for failure to deliver a message informing sendee of the death of her brother, distin-

guished the case of *Smith vs. Western Union Teleg. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, relied upon in petitioner's brief in the case at bar, and points out that in that case Smith, who was speculating upon the New York stock market, failed to receive a telegram relating to his stock transactions, and claimed that if the telegram had been delivered in due time he would have kept his margin good and saved himself from the loss of several thousand dollars, which he sought to recover from the company. In the Caldwell case, the Court, continuing on page 751 of 12 L. R. A., says:

"In affirming the judgment awarding Smith nominal damages the Court rested its conclusions upon the ground that the damages sought to be recovered were too remote; that they did not flow naturally from the failure to deliver the telegram, and, in the ordinary course of events, could not have been expected to arise from its non-delivery; and that the injury complained of was not contemplated by the parties at the time the contract for the transmission of the message was entered into, nor did the contents of the message inform the company of the probable action Smith would take upon its receipt."

The Court then distinguishes the cases and points out that the testimony of the sendee that she would have wired to have the funeral postponed until she could get there and the testimony of relatives that

her wishes would have been respected were uncontradicted and supported by the ordinary rules of human experience when judged by the standards that regulate the conduct of people generally. The Court in answering the same contention made here, said:

"It is true, intervening steps must have been taken, and independent causes set in motion. But there is no reasonable doubt concerning what she and the family of the deceased would have done, had the message been delivered. The appellant undertook to transmit and deliver to the addressee without unreasonable delay this message, and should be held liable for the consequences of its negligence that in the usual course of events and according to human experience were likely to ensue, and which, from the nature of the message, might have been anticipated with reasonable certainty."

This language, we submit, applies with equal force to the present case.

The other circumstances, in addition to respondent's testimony that if he had received the message he would have immediately wired his acceptance, referred to by the Court of Appeals, are that respondent was familiar with the condition of the Idaho National Bank. He declined to enter the merger which Miller was negotiating. He had previously had bad experience with bank stock. He did not want to keep the stock any

longer but wished to sell it. He talked over the sale with Miller at Boise during the fall before the telegram was prepared, and before he, Czizek, went to California, but the sale was not then consummated because Miller was not ready at that time to purchase, but was going East to get the money and would be back at a certain time and would then buy the Jones and Czizek stock. Czizek, before his departure for California, appointed Jones as his agent to deal with Miller when he, Miller, returned, and Jones and Czizek were to sell together. Czizek informed Miller to that effect before leaving for California. Upon Miller's return to Boise with over \$80,000 with which to buy stock of the bank, he went to Jones to obtain the Jones and Czizek stock, and the telegram in question was the result. This message, if transmitted and delivered, would have conveyed to Czizek the information that the sale of the Idaho National to the Pacific National had been made, subject to Miller obtaining two-thirds of the Idaho National stock, and that if Miller did not obtain the two-thirds there would be a delay of a year and chances of liquidation of the Idaho National Bank, and that if Miller did not get two-thirds of this stock liquidation would follow. That Miller was ready to pay \$90.00 per share, and that Jones, who was on the ground and acting for Czizek, was inclined to accept the offer of \$90.00 per share for his stock.

Not alone these facts, but the ordinary rules of business conduct support respondent's testimony that he

would have immediately wired his acceptance of the offer had he received the message.

Clearly the damages sustained were the direct and natural result of petitioner's default, and were such as, from the very nature of the message as disclosed on its face, might be the result of the failure in transmission.

With reference to petitioner's contention at the top of page 60 of its brief, that the telegram in suit was not even an offer but only an inquiry as to whether the respondent would sell, we will refer to the finding of the Trial Court on the first hearing (Tr. p. 154):

"I further find that Miller desired and was able to buy the stock at \$90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of \$90.00, and, had it been delivered, such is the meaning it would have conveyed to him."

As already pointed out, this is the only conclusion that could be reached from the evidence.

For these reasons, and without further discussion of the cases cited by the petitioner, we respectfully submit that these cases are not authority here, and that this defense to the action should not prevail.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT ITS RULING ON THE FORMER HEARING UPON THE SAME STATE OF FACTS BECAME THE LAW OF THE CASE AND WAS CONTROLLING ON THE LAST APPEAL WAS CORRECT.

We submit that the reasoning of the Court of Appeals on this question (Tr. p. 144-46) is sound.

The case of *Messenger vs. Anderson*, 225 U. S. 436, relied upon, differs from the case now on argument, because it involved the construction of a will upon which title to land in Ohio was dependent, and the Supreme Court of Ohio, in an action between the same parties pending the proceedings in the Federal Court, construed the will differently from the construction placed thereon by the Federal Court. (*Anderson vs. United Realty Company*, 79 Ohio St. 23, S. C. 222 U. S. 164.) The question was whether on the second appeal the Circuit Court of Appeals was so far bound by its former decision as to preclude it from following the state decision in a matter of local law. This Court held that the rule as to law of the case expresses the practice of Courts generally to refuse to reopen what has been decided, not a limit to their power, and on page 445 said:

"We should lean towards an agreement with the State Court, especially in a matter like this."

Like reasons do not apply to this case, nor do we

find that this Court has ever over-ruled the case of *Roberts vs. Cooper*, 20 How. 481, 15 L. Ed 969, which seems to have been followed ever since by the Federal and State Courts.

Since it is not a jurisdictional question, this Court may in these proceedings review the first decision, but we respectfully suggest that it might not wish to do so, at the instance of the petitioner, who had the opportunity to apply for a writ of certiorari within three months from the first decision, but did not do so, and, however desirable it may be for the questions involved in that decision to be finally set at rest by this Court, it may perhaps be considered equally important that the wholesome practice involved in the rule which puts an end to litigation be again recognized by this Court.

We respectfully submit that the judgment should be affirmed.

RICHARD H. JOHNSON,  
CAREY H. NIXON,

Boise, Idaho,

*Counsel for Respondent.*

FILE COPY

FEB 25

No. 300

WM. R. ST

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation  
*Petitioner*

*vs.*

J. A. CZIZEK

*Respondent*

**REPLY BRIEF**

*on behalf of*

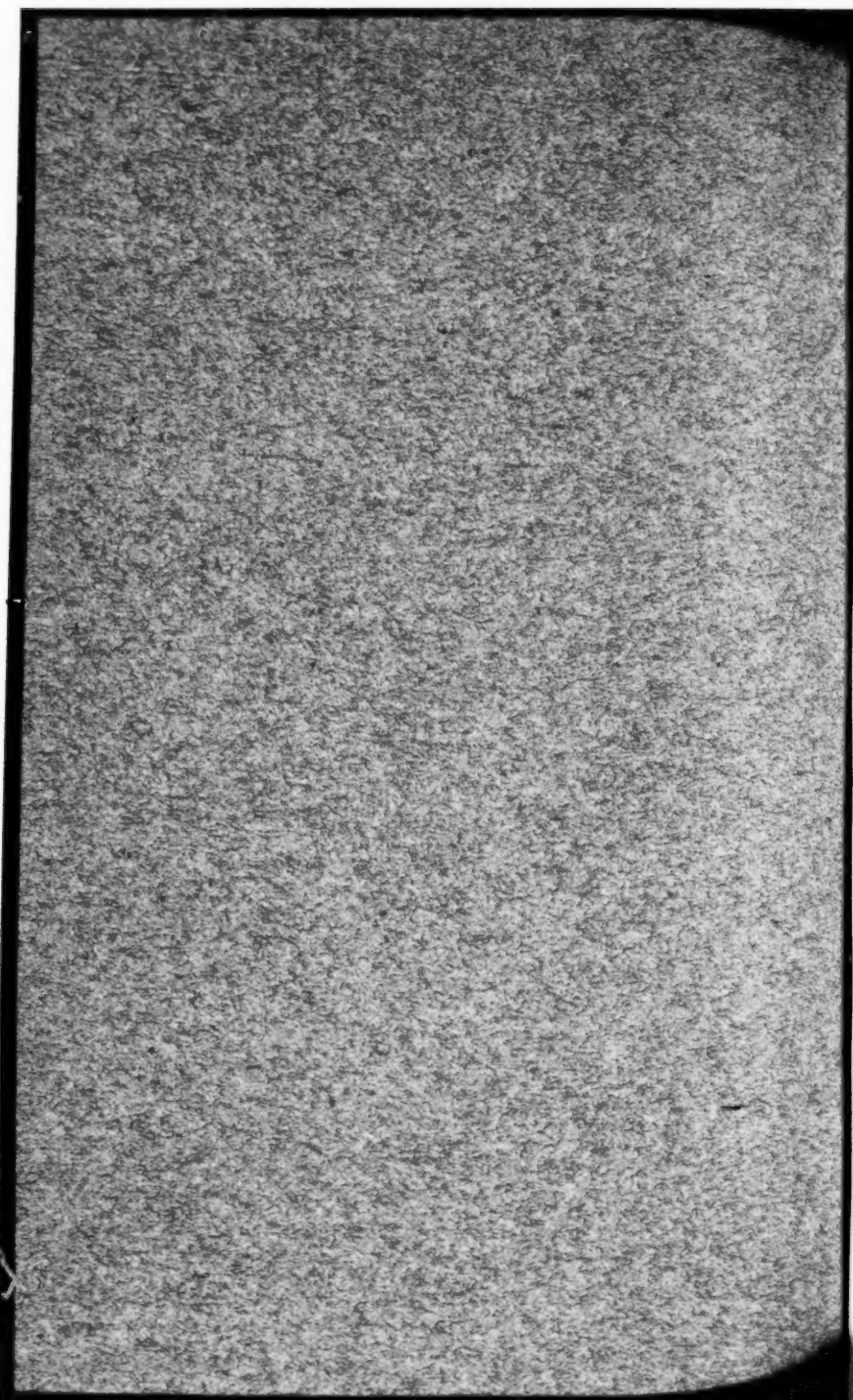
**THE WESTERN UNION TELEGRAPH COMPANY**  
*Petitioner.*

✓ FRANCIS R. STARK,  
195 Broadway, New York.

✓ BEVERLY L. HODGHEAD,  
14 Montgomery Street, San Francisco.

✓ JOSEPH L. EGAN,  
195 Broadway, New York.

✓ J. JULIEN SOUTHERLAND,  
195 Broadway, New York.  
Counsel for Petitioner



No. 300.

In The  
Supreme Court of the United States

OCTOBER TERM, 1923.

THE WESTERN UNION TELEGRAPH  
COMPANY, a Corporation,

*Petitioner,*

*vs.*

J. A. CZIZEK,

*Respondent.*

**REPLY BRIEF**  
*on behalf of*  
**THE WESTERN UNION TELEGRAPH**  
**COMPANY**  
*Petitioner.*

**I.**

**The Unrepeated Message Clause.**

Respondent's argument that the limitations of liability provided for by the language that "the company shall not be liable for *mistakes or delays in the transmission or delivery, or for non-delivery*" beyond a certain sum, and that the company "shall not be liable for damages \* \* \* for any mistakes or delays in the *transmission or delivery, or for the non-delivery*" of a telegram

beyond a certain other sum, do not include a *failure of transmission*, is without merit. These limitations were designed to, and do, cover every conceivable default which can occur in connection with the transmission of a telegram. In this case the allegation of the complaint is not that the message was never transmitted from the office at Boise, Idaho, but that it was "never transmitted by defendant *to plaintiff*, and was consequently *never received by plaintiff*" (Tr., p. 10). The fact of ultimate importance, out of which the liability, if any, springs, is not the failure to send the message to or beyond this or that particular point, but the failure to place it promptly and correctly in the hands of the addressee—i.e., the non-delivery. The sender is interested only in the correct transmission and delivery of his telegram, as is likewise the addressee. If the message is not delivered to the addressee in correct form as filed by the sender, what conceivable difference can it make to either of them where the failure of duty occurred? If a message is filed with a telegraph company at New York addressed to San Francisco, and the telegraph company fails to deliver it as addressed because the message was inadvertently sent to San Antonio, or because the message was inadvertently placed with sent messages in the New York office, or because the message was inadvertently placed with the delivered messages in the San Francisco office, what affects the sender and the addressee is the fact that the addressee did not receive the message and not its particular cause.

As was said by the supreme court of Indiana in *Western Union v. Brattan*, 165 Ind. 165; 71 N. E. 985, in holding that a statute which provided a penalty for failure of a telegraph company to "transmit" messages with impartiality and in good faith, and in the order of time in which they were received, applied to a failure to *deliver* a message after its arrival at the terminal office:

"It is incomprehensible how a telegraph company may receive and transmit a message from one to another without a delivery."

The converse of this must also be true. Since there can be no delivery without transmission, non-transmission must be included in the term "non-delivery."

On page 22 of respondent's brief, reference is made to 37 Cyc. 1686, and to the case of *Beatty Lumber Company v. W. U.*, 52 W. Va. 410; 44 S. E. 309. But this reference to Cyc is to the section dealing with the modification of the liability of telegraph companies BY CONTRACT. That subject has nothing to do with the point under consideration. It is well known that in a number of jurisdictions the stipulations, considered as contract provisions, are regarded as altogether invalid. Before the Act of 1910 the *Primrose case* (154 U. S. 1), was not, even as to interstate messages, binding on State courts. Some State courts refused to follow it at all, even as to errors; while others, recognizing the right of the company to limit its liability for errors and other acts of "simple" negligence, held

that a limitation of liability for "gross" negligence was contrary to public policy, and a few, in the application of that rule, have treated the failure to send a message from the point of origin, when unexplained, as prima facie evidence, at least, of "grossness."

Thus in the *Beatty Lumber* case, decided in 1903, which may be taken as typical of the cases cited by respondent, it was said, with reference to the unrepeatd message condition:

"Whether such a condition is valid has been the prolific source of elaborate and able discussion in England and almost every one of the American states, and in the Federal courts, and there is vast conflict of opinion between the courts upon the subject; many courts holding such a condition utterly void to exempt the company from liability, and others holding it valid, or partly valid. It is a well-established rule that a common carrier cannot make any contract or stipulation with one dealing with it by which it can screen itself from liability for loss arising from its negligence. \* \* \* It is because of that doctrine that so many courts stamp the above condition as void, but it must be said that the preponderance of authority holds such condition valid, certainly to the extent of excusing the company from loss for want of ordinary care. \* \* \* The subject is ably discussed in *Primrose v. Western Union Telegraph Company*, 154 U. S. 1. \* \* \*

"As to that clause excusing total failure to deliver, it can be said that even those courts which hold such a condition good as to mere error in transmission recognize that it is not good to forgive a total failure to deliver or to transmit."

It will thus be seen that in this case the court was considering not what the parties intended by the stipulation, but how far public policy would permit that intention to be given effect. The validity of the stipulation since the Act of 1910 as against "gross" negligence has already been dealt with in our principal brief. But it is significant, and attention is particularly invited to the fact, that in the *Beatty Lumber Company* case (which incidentally holds that there can be no proximate damage as the result of the non-delivery of a message such as this, containing a mere offer), the court made no distinction between a failure to transmit a message and a failure to deliver it.

This case, as well as the cases of *Pierce Company v. W. U.* and *Weld v. Postal*, cited on page 29 of respondent's brief, and the cases of *Wenger* and *Wann* cited on page 30, were decided long before the Act of 1910.

The case of *Freschen v. W. U.*, 189 N. Y. Supp. 649, cited on pages 30 and 31 of respondent's brief, was decided before the decision of this court in the *Estere* case, and it may not be improper to mention that after the *Esteve* decision was brought to the attention of counsel for plaintiff in the *Freschen* case, the judgment in that case was reversed by stipulation of counsel.

### **The Valuation Clause.**

We will not undertake to re-argue the validity of the fifty-dollar valuation clause, because it has been approved by the Commission and by this court. If the sender of a message cannot contemplate within reasonable limits the extent of the damage which is likely to result from its non-delivery, neither can the telegraph company; and there is no reason why the telegraph company should be liable for a consequence which it could not contemplate. Indeed, it would not be even in the absence of conditions. *Hadley v. Baxendale*, 9 Exch. 345; *Primrose v. Western Union*, 154 U. S. 1. That the fifty-dollar valuation clause is not affected by the degree of the negligence, if negligence has degrees, has been shown in the principal brief.

In this connection it may not be amiss to quote from the answer in the original Unrepeated Message Case.

#### **"No Reason Why a Message cannot be Valued.**

"The respondent submits that there is no merit in the suggestion that a message in its nature is not susceptible of valuation. If the sender of a message, who contracts with a telegraph company that it shall be transmitted, is unable to form any intelligent estimate of the money value, to himself or the addressee (whichever is the legal party in interest), of a proper performance of the telegraph company's promise, then it is certainly not unfair that the telegraph com-

pany's liability for failure to perform its promise should be limited to a specified sum beyond which the sender cannot say that he or the addressee will be damaged by non-performance. Since the telegraph company should not be liable in any event except for such consequences as it could reasonably have contemplated, there is nothing unreasonable about insisting that the sender also shall be held to the duty to contemplate the possible results of non-performance, and shall express his conclusion in dollars and cents before, instead of after, the happening of a default, or in the alternative that he should be held to some reasonable limit of recovery; and the respondent again avers that the limitation of fifty dollars is a reasonable limit, and far in excess of the money loss which is likely to result from any possible default in connection with the handling of the average message, or with the handling of more than seventy-five per cent. of all telegraph messages. If the case is one in which the value can be reasonably calculated in advance, it is not unfair to require the sender to calculate it; if the case is one in which the value cannot be reasonably calculated in advance, it is not unfair to say that the respondent shall not be liable for what it could not have foreseen beyond an amount far in excess of the possible damage in connection with the ordinary message."

Respondent refers to the case of *Leedy v. W. U. T. Co.*, 130 Tenn. 547; 172 S. W. 278. In so far as that case cast any doubt on the validity of the fifty-dollar valuation clause, it must be considered as overruled by *W. U. T. Co. vs. Schade*, 137 Tenn. 214; 192 S. W. 924 (1917), in which the court said:

"It is now generally held, as the court of civil appeals states, that by this amendatory act Congress has occupied the field with respect to interstate telegrams. The result is to make applicable the rulings of the Federal courts in reference to the validity of contractual limitations, such as that of a \$50 liability for such failure in relation to messages sent from one state to another. The question was raised by counsel and stated in the opinion in *Leedy v. Western Union Tel. Co.*, 130 Tenn. 547, 550; 172 S. W. 278, but a decision of the point was found not necessary in that case."

### **Effect of the Second Decision of the Interstate Commerce Commission in the Unrepeated Message Case.**

It is argued that because in the reopened Unrepeated Message Case, reported in 61 I. C. C. 541, the limitations of liability theretofore in effect were held to be unreasonable as to amount, such holding was retroactive, and that therefore the conditions had always been unreasonable. Such is not the effect of that decision. In the first opinion in that case (May 17, 1917, 44 I. C. C. 670), the Commission said:

"It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of message with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject of course to the general provisions in the

act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. \* \* \*

"Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeatable rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary *are binding upon all until lawfully changed*; and that neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

It will be noted that the decision just referred to was handed down by the Commission on May 17, 1917, and that the message on which this

action was based was filed with the telegraph company on November 30, 1917.

Furthermore, in its opinion in the reopened case (May 3, 1921, 61 I. C. C. 541) the Commission said:

"The Unrepeated Message Case was decided May 17, 1917. By it common carriers engaged in the transmission of messages were apprised as to what, in our opinion, their practices should be in the settlement of damage claims arising through defaults in service. In order that we might be informed whether the general practice of the Western Union, defendant in the Unrepeated Message Case, was in conformity with its published rules and also to obtain further information relative to the reasonableness of the rules, that proceeding was set down for further hearing."

The report of the Commission concluded with the following:

"Upon consideration of the record we find that the present rules of the respondents restricting their liability for negligence in the transmission or delivery, or for non-delivery, of unrepeated and repeated interstate messages *are and for the future will be unreasonable; \* \* \*.*"

The order of the Commission issued May 3, 1921, directed that:

*"That said respondents be, and they are hereby, notified and required to cease and desist, on or before July 13, 1921, and thereafter to abstain, from maintaining or applying the present rules and provisions limit-*

ing respondents' liability for errors or delays in the transmission or delivery, or for non-delivery, of interstate messages by telegraph."

During the interval between May 3, 1921, the date of the order, and the date when that order became effective, July 13, 1921, it is manifest that the Commission intended that the then existing limitations, which had been approved in the decision of May 17, 1917, should continue in effect. The Commission's own view of the effect of its order, namely, that it was not retroactive, has several times been expressed in letters to claimants, typical examples of which are attached as Exhibit A.

Manifestly these considerations distinguish the present from the case of *Pennsylvania R. R. Co. v. Stineman Coal Company*, 242 U. S. 299.

It may be said in passing that respondent's counsel is in error in assuming that the plaintiffs in the *Cultra* case (the action at law for damages in Missouri) were allowed a recovery. As a matter of fact that case was dismissed on December 12, 1917.

### **The Sixty Day Clause.**

This condition is intended to and does impose on the claimant the duty of ascertaining whether he has a claim within sixty days from the time the message was sent, and giving written notice of it if he has. It does not, nor was it intended to, prescribe a period, long or short, within which

he shall present a claim after he has in fact discovered the failure of his message. Such as it is, it has been repeatedly sustained by the courts, including the decision of the Circuit Court of Appeals in the *Gardner* case, referred to in our principal brief, in which this court refused certiorari. That it cannot be waived has been abundantly shown by the authorities cited in our principal brief. See also *Kerns v. Western Union Telegraph Company* (Missouri), 198 S. W. 1132 (not officially reported), and *Postal v. Howe* (Nevada), 211 Pac. 358 (not officially reported).

### **The Law of the Case.**

The petitioner could not have applied to this court for certiorari after the decision of the Circuit Court of Appeals on the first appeal, because, the case having been remanded to the District Court for further proceedings, that decision of the Circuit Court of Appeals was not final. It is unnecessary to refer to the recent case of *Georgia Ry. Co. v. Decatur*, 262 U. S., 432, 437, in which it was said:

"We are not unmindful of the ruling of the Appellate Court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western*

*Telegraph Co. v. Burnham*, 162 U. S. 339, 343; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214; *Zechendorf v. Steinfeld*, 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this Court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases cited."

The following is quoted from *United States v. Denver & Rio Grande R. R.*, 191 U. S. 84, 93:

"While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

Other cases in point are *Coc v. Armour Ferti-*

*lizer Works*, 237 U. S. 413, 418, and *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U. S. 251.

Respectfully submitted,

FRANCIS R. STARK,  
195 Broadway, New York.

BEVERLY L. HODGHEAD,  
14 Montgomery Street,  
San Francisco.

JOSEPH L. EGAN,  
195 Broadway, New York.

J. JULIEN SOUTHERLAND,  
195 Broadway, New York,  
Counsel for Petitioner

**Exhibit A.**

INTERSTATE COMMERCE COMMISSION  
Office of the Secretary  
Washington

George B. McGinty,  
Secretary.

765736

January 16, 1922.

J. C. Mayer & Co.,  
318 Walnut Street,  
Cincinnati, Ohio.

Gentlemen:

This will acknowledge receipt of your letter of January 6, attacking the Commission's ruling regarding the limitation of the liability of the telegraph companies in connection with the transmission of telegraph messages.

It may be well to state at the beginning that although this Commission under the Interstate Commerce Act has jurisdiction over the rates charged for, as well as the rules and regulations in connection with, messages forwarded interstate by telegraph or telephone companies, it does not exercise jurisdiction to determine the merits of loss and damage claims such as those alluded to by you, your remedy being by suit in a court of competent jurisdiction.

Doubtless the case to which you refer is the Unrepeated Message Case, *The Clay County Produce Company v. The Western Union Telegraph Co.*, 61 I. C. C. 541. For your information there is enclosed a copy of the decision therein. You will observe that the Commission ruled that the maximum liability in the case of a message for the transmission of which the unrepeated rate is charged should not be less than \$500. **The rea-**

sonable rules as prescribed by the Commission were ordered to take effect on July 13, 1921, and should not be considered as applying retroactively. Apparently therefore the Western Union was correct in refusing to make refund in excess of the amount received for sending the message in May, 1921.

It is believed that a careful reading of the enclosed report will demonstrate to you that your complaint was filed under a misapprehension of the Commission's rulings on the subject and that the telegraph companies may not now attempt to exempt themselves from liability, beyond the toll received, for the improper handling of unrepeatd messages.

Respectfully,

G. B. McGINTY,

Secretary

Enc.

INTERSTATE COMMERCE COMMISSION  
Washington  
File No. 750577

December 13, 1921.

Mr. C. A. Herman, Traffic Dept.,  
Cudahy Brothers Company,  
Cudahy, Wisconsin.

Dear Sir:

This will acknowledge receipt of your letter of November 28th, relative to your claim No. 20361, against the Western Union Telegraph Company for damages alleged to have been suffered through delay in the transmission of a telegraph message June, 1921.

For your information, it may be stated that while this Commission has jurisdiction to determine whether or not the charges of the telegraph companies are just and reasonable, it does not

exercise jurisdiction to pass upon the merits of loss and damage claims such as you mention, your remedy, if any, being by suit in a court of competent jurisdiction along the usual lines of procedure.

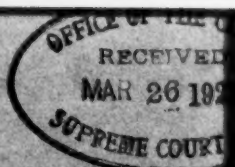
In compliance with your request, there is enclosed a copy of the Commission's decision in the Unrepeated Message Case, the Clay County Produce Company v. Western Union Telegraph Company, 61 I. C. C. 541, relative to the limitations of liability in connection with the transmission of telegraph messages. **The reasonable rules prescribed by the Commission were ordered to take effect on July 13, 1921, and should not be considered as applying retroactively.** The fact that the Commission's decision was rendered prior to the transmission of the message in question is not believed to be controlling, insofar as the retroactive effect of that decision is concerned.

Respectfully,

G. B. McGINTY,  
Secretary

FILE COPY

No. 300



IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

6

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH  
COMPANY

*Petitioner,*

VS.

J. A. CZIZEK,

*Respondent.*

PETITION FOR REHEARING

RICHARD H. JOHNSON,  
CAREY H. NIXON,  
Boise, Idaho,  
*Counsel for Respondent.*

THE COURT

OF THE STATE

IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

---

OCTOBER TERM, 1923

---

THE WESTERN UNION TELEGRAPH  
COMPANY

*Petitioner,*

VS.

J. A. CZIZEK,

*Respondent.*

---

PETITION FOR REHEARING

---

RICHARD H. JOHNSON,  
CAREY H. NIXON,  
Boise, Idaho,  
*Counsel for Respondent.*



IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH  
COMPANY

*Petitioner,*

VS.

J. A. CZIZEK,

*Respondent.*

**PETITION FOR REHEARING**

The said J. A. Czizek, respondent, comes now and respectfully petitions this Honorable Court for a rehearing of said cause, for the following reasons, to-wit:

Because the Court inadvertently fell into an error as to certain *facts* in the record, which were not sufficiently stressed by counsel for respondent at the hearing. No question is or should be raised as to the law announced by the Court, but we feel that the Court, being human, may make a mistake as to facts, and that it has done so in this case. That it is our duty to call it to the Court's attention, and we feel that the

Court will willingly correct it before the mandate goes down.

There is no evidence whatever in the record that the receiving clerk, Margaret Brown, by inadvertence or otherwise, placed the telegram in suit in the file of earlier messages. The Company made a futile attempt to show this at the second trial. Margaret Brown did not testify at the trial, but a stipulation was filed (Tr., p. 120) as to what Margaret Holland, formerly Margaret Brown, would testify to, if called. She said (Tr., p. 121):

"I was with the Company in November, 1917, as counter clerk. I do not remember anything regarding the nature of the message from T. J. Jones to J. A. Czizek at Oakland, California, nor do I recall the circumstances of its delivery to the Western Union office."

Her conjecture as to how she might have placed the message in the earlier files was stricken out by the Trial Court because she remembered nothing about it.

The testimony of Mr. Hackett, the Manager, was by stipulation in the same way. He said (Tr., p. 113):

"I had no knowledge of the filing of the message involved in this action, nor of the fact that it had been misplaced, or that it failed in transmission, until the middle of February, 1918."

The statement, therefore, in petitioner's brief and urged at the argument, that Margaret Brown inadver-

tently placed the message in the earlier file, is not supported by the evidence, as was pointed out by the Circuit Court of Appeals. (Tr., pp. 147-48.)

As to the facts in the record relating to the answers to the two inquiries made by the sender, we respectfully call attention to the following. Mr. Hackett testified (Tr., p. 113):

“All messages filed with the company each day are, at the close of the business for that day, checked over *to ascertain whether they have been properly transmitted*. This fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it, which includes the initials of the operator sending the same and the time when the same is transmitted. After this check is made, the messages for the particular day are bound together and tied with a string and laid away for future reference.” (Italics ours.)

When inquiry was made by Jones, the sender, on December 1, 1917, the day following the sending of the message (Tr., 90), he:

“asked if there was a message there for Jones. She said ‘no’, and then I asked her if they had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland.”

(Objections and argument.)

On page 92, witness continued:

"She looked through some papers and files, and said the telegram had been sent. Well, Sunday came in and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked out."

The only records which the clerks should have examined to ascertain whether the message had been sent, was the package of messages sent on November 30th, and which were bound together at the close of that day and filed away for future reference. Had this been done the message would not have been found there, and it would have been apparent at once that it had not been sent. It could have been found in the earlier files as readily at that time, as in the middle of February following. We most respectfully urge that if any presumption is to be indulged in at all, it is more logical to assume that the clerks to whom the inquiries were made either did not care to be bothered about the matter, or, to cover up the mistake, deliberately told Jones that the message had been sent and

delivered. These employees of the Company had in their possession the only means of ascertaining the truth, while Jones had none.

These were clearly false statements and should be presumed, under these circumstances, to have been wilfully rather than inadvertently made, and to show such entire failure of duty which the Company owed to the sender, and as to raise the presumption of a conscious indifference to consequences.

This being true, under the principles announced by this Court in its opinion, respondent is not precluded from recovery. The Court did not adopt petitioner's contention as stated on page 3 of its reply brief, as follows:

"These limitations were designed to, and do cover every conceivable default which can occur in connection with the transmission of a telegram."

Moreover, we respectfully submit, that if truthful answers had been made to the inquiries, it was not too late on December 1st or on December 3d, as suggested in the opinion, for the injury to respondent to have been avoided, as a telegram sent on the latter date would have been in time. Miller was ready, anxious and able on that date to purchase the stock and did purchase the Jones stock on the 3d of December (Tr., p. 65). His balance in the bank at the close of business on December 3d was \$30,826.50, and on December 4th was \$30,818.41 (Tr., p. 97).

We respectfully urge the Court to give due consideration to these facts and to the further fact that respondent was wholly free from any fault in the matter, and his agent, Jones, did everything possible to call the matter to the Company's attention in ample time to have avoided the damage.

It would seem, therefore, to conclusively follow, independently of the ruling that "non-delivery" includes "non-transmission", that under the rule announced in the opinion, in the presence of facts which, unexplained, raise a presumption of wilful or conscious neglect, respondent should be entitled to recover, regardless of the valuation clause, as held by the Circuit Court of Appeals. This question was not passed upon by this Honorable Court, due to a misapprehension of the facts as outlined above.

We further respectfully call attention to the fact that if the failure to insure a message excuses the negligence here shown, which is as great as any conceivable form of default, the Company owes no duty whatever to the public in relation to the other classes of messages, a privilege not enjoyed by any other carrier operating under classified rates and regulations.

Wherefore, your petitioner respectfully prays that an order may be made for a rehearing of the argument in this case, on a day to be appointed by this Court, at the present term, and upon such points as the Court

may direct, and that the mandate of this Court be stayed until after such hearing.

J. A. CZIZEK, *Petitioner.*

By RICHARD H. JOHNSON,  
CAREY H. NIXON,  
*His Counsel.*

BOISE, IDAHO, March 19, 1924.

#### CERTIFICATE OF COUNSEL

I, Richard H. Johnson, do hereby certify that I am one of the Counsel for Petitioner named in the foregoing petition for rehearing, that I have read the foregoing petition, and verily believe that the points raised therein are meritorious; that said petition is filed in good faith and not for the purpose of delay.

(Signed)

RICHARD H. JOHNSON.

# SUPREME COURT OF THE UNITED STATES.

No. 300.—OCTOBER TERM, 1923.

Western Union Telegraph Company,	} On Writ of Certiorari to	
Petitioner,		the United States Cir-
vs.		cuit Court of Appeals
J. A. Czizek.	} for the Ninth Circuit.	

[March 10, 1924.]

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit against the Telegraph Company for failure to forward and deliver to the plaintiff a message from one Jones, found by the Court below to have been acting as agent for the plaintiff in the matter. The District Court found for the defendant, but the judgment was reversed by the Circuit Court of Appeals, 272 Fed. Rep. 223, and at a second trial, in deference to the Circuit Court of Appeals, a judgment was entered for the plaintiff, which was affirmed, 286 Fed. Rep. 478. Certiorari granted, 262 U. S. 739.

The plaintiff owned fifty shares of stock in the Idaho National Bank at Boise, Idaho. Miller, vice president of the bank, was buying the stock with a view to a merger. He talked with the plaintiff and told him that he would buy his stock and that they would have no difficulty in agreeing on the price. The plaintiff told this to Jones, an attorney at Boise, who owned fifteen shares, asked Jones to act for him, saying that they would sell their stock together, and told Miller that Jones would represent him. Later Miller called on Jones and at Miller's request Jones, on November 30, 1917, wrote on a Western Union form—directing the Company to send it 'subject to the terms on back hereof', the following telegram addressed to the plaintiff at 5767 Shafter Avenue, Oakland, California, where the plaintiff lived: "Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per

share for yours. I am inclined to accept offer for mine. Answer." The form had been filed with the Interstate Commerce Commission and the Commission had approved the provisions and rates that it set forth. Among the terms on the back of the form were the following: "To guard against mistakes or delays, the sender . . . should order it REPEATED, that is, telegraphed back to the originating office for comparison," an additional half rate being charged. "Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed . . . 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any UNREPEATED telegram, beyond the amount received for sending the same. . . 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

This telegram was an unrepeatd message of the class known as night letter, and was not specially valued or paid for upon a value in excess of \$50. It was the duty of the receiving clerk, Margaret Brown, to indorse her initials, the filing time and the amount of toll received, and to place the message on the sending hook for transmission. By inadvertence, although a competent clerk, she put it in a file of earlier messages instead of upon the hook, and it was not sent. The next day Jones's son inquired at the telegraph office for an answer and being told that there was none, asked if they had sent the telegram and was answered yes. On December 3 he asked again and was told that the plaintiff had received the message. Miller was ready and willing to buy the stock until December 5, 1917, and the plaintiff testified that he would have sold if he had received the telegram. Later the stock became worthless. The District Court found that there was no gross negligence but the Circuit Court of Appeals distinguished between a failure to take the first step toward transmission and some later neglect, held that the failure was not and as a matter of

public policy could not be within the protection of the terms that we have stated and held the company liable for \$4,500 with interest at seven per cent. from June 18, 1918, on which day the plaintiff made a demand.

The plaintiff, the respondent here, does not deny that he is bound by the terms that we have recited. That was assumed below and is established law. *Western Union Telegraph Co. v. Estere*, 256 U. S. 566. Those terms apply as definitely to a nondelivery in consequence of a neglect or oversight at the first office as at any other. The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the Company, but no more at the beginning than at the end, and as in fact it is that of servants; reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher value on paying more for it. *Adams Express Co. v. Croninger*, 226 U. S. 491. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Estere*, 256 U. S. 566, 574; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27.

When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.*, 100 Kans. 250, 252. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15. With regard to the amount of the valuation, if it is too low now, *Unrepeated Message Case*, 61 L. C. C. 541, it was reasonable in 1917. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1,

15. *Unrepeated Message Case*, 44 I. C. C. 670. Whatever effect may be given to the judgment of the Commission in the later case, it was not intended to be retroactive. The rules prescribed by the Commission were to take effect on July 13, 1921.

We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. *Unrepeated Message Case*, 61 I. C. C. 541.

Another clause not mentioned as yet reads: "The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission." This could not be held to apply literally to a case where through the fault of the Company the plaintiff did not know of the message until the sixty days had passed. It might be held to give the measure of a reasonable time for presenting the claim after the fact was known, in the absence of anything more. But here the plaintiff called on Hackett, the General Manager at Boise, about February 14, 1918, as soon as he knew the facts. Directly after, he received a letter from Hackett regretting the occurrence and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiff returned the check by letter saying "an acceptance of this check on my part might be construed as a settlement of this matter," so that the defendant then had written notice that a claim was made. There was further communication and finally on June 18 the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause. But we are of opinion that his claim is limited to fifty dollars for the reasons given above.

*Judgment reversed.*

Mr. Justice McKENNA dissents.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

WESTERN UNION TELEGRAPH COMPANY v.  
CZIZEK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.

No. 300. Argued February 26, 27, 1924.—Decided March 10, 1924.

1. A contract between a telegraph company and the sender of an unrepeatd interstate message, on a form filed with and approved by the Interstate Commerce Commission, valued the message at \$50.00 in default of any higher valuation specified by the sender and paid for at a higher rate, and relieved the company of liability beyond that sum for mistakes or delays in the transmission or delivery, or for the non-delivery of the message, caused by the negligence of its servants or otherwise. *Held* valid and applicable although the message was never transmitted, due to the inadvetence of a receiving clerk in filing it in the wrong place, and to subsequent mistaken assurances that it had been sent. P. 284.
2. *Quaere*: Whether this agreed limitation of liability would not have applied even if the failure to transmit had been attributable to gross negligence? P. 285.
3. The reasonableness of such a limitation is determined as of the date of the contract and not by later, prospective rules of the Interstate Commerce Commission. *Id*.
4. *Seemle*, that another printed stipulation on the telegram limiting the company's liability for nondelivery, etc., of any unrepeatd message to the amount received for sending it, was invalid in this case. *Id*.
5. A stipulation on a telegram exempting the company from liability if claim is not presented in writing within sixty days after filing of the message for transmission, *held* inapplicable where the filing of the message, by the plaintiff's agent, was unknown to the plaintiff during the sixty days, and where the plaintiff thereafter was diligent in presenting his claim. P. 286.

286 Fed. 478, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiff Czizek in an action against the Telegraph Company for damages resulting from the failure to forward and deliver a telegram.

*Mr. Francis R. Stark and Mr. Beverly L. Hodghead, with whom Mr. J. H. Richards, Mr. Oliver O. Haga, Mr. Joseph L. Egan and Mr. J. Julien Southerland were on the briefs, for petitioner.*

*Mr. Richard H. Johnson, with whom Mr. Carey H. Nixon was on the brief, for respondent.*

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit against the Telegraph Company for failure to forward and deliver to the plaintiff a message from one Jones, found by the Court below to have been acting as agent for the plaintiff in the matter. The District Court found for the defendant, but the judgment was reversed by the Circuit Court of Appeals, 272 Fed. 223, and at a second trial, in deference to the Circuit Court of Appeals, a judgment was entered for the plaintiff, which was affirmed. 286 Fed. 478. Certiorari granted. 262 U. S. 739.

The plaintiff owned fifty shares of stock in the Idaho National Bank at Boise, Idaho. Miller, vice president of the bank, was buying the stock with a view to a merger. He talked with the plaintiff and told him that he would buy his stock and that they would have no difficulty in agreeing on the price. The plaintiff told this to Jones, an attorney at Boise, who owned fifteen shares, asked Jones to act for him, saying that they would sell their stock together, and told Miller that Jones would represent him. Later Miller called on Jones and at Miller's request Jones, on November 30, 1917, wrote on a Western Union form—directing the Company to send, "subject to the terms on

back hereof", the following telegram addressed to the plaintiff at 5767 Shafter Avenue, Oakland, California, where the plaintiff lived: "Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer." The form had been filed with the Interstate Commerce Commission and the Commission had approved the provisions and rates that it set forth. Among the terms on the back of the form were the following: "To guard against mistakes or delays, the sender . . . should order it REPEATED, that is, telegraphed back to the originating office for comparison," an additional half rate being charged. "Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed . . . 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any UNREPEATED telegram, beyond the amount received for sending the same . . . 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

This telegram was an unrepeated message of the class known as night letter, and was not specially valued or paid for upon a value in excess of \$50. It was the duty of the receiving clerk, Margaret Brown, to indorse her in-

itals, the filing time and the amount of toll received, and to place the message on the sending hook for transmission. By inadvertence, although a competent clerk, she put it in a file of earlier messages instead of upon the hook, and it was not sent. The next day Jones's son inquired at the telegraph office for an answer and being told that there was none, asked if they had sent the telegram and was answered yes. On December 3 he asked again and was told that the plaintiff had received the message. Miller was ready and willing to buy the stock until December 5, 1917, and the plaintiff testified that he would have sold if he had received the telegram. Later the stock became worthless. The District Court found that there was no gross negligence but the Circuit Court of Appeals distinguished between a failure to take the first step toward transmission and some later neglect, held that the failure was not and, as a matter of public policy, could not be within the protection of the terms that we have stated and held the company liable for \$4,500 with interest at seven per cent. from June 18, 1918, on which day the plaintiff made a demand.

The plaintiff, the respondent here, does not deny that he is bound by the terms that we have recited. That was assumed below and is established law. *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566. Those terms apply as definitely to a nondelivery in consequence of a neglect or oversight at the first office as at any other. The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the Company, but no more at the beginning than at the end, and as in fact it is that of servants, reasonable self-protection is allowed to the

master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher value on paying more for it. *Adams Express Co. v. Croninger*, 226 U. S. 491. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566, 574; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27.

When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.*, 100 Kans. 250, 252. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15. With regard to the amount of the valuation, if it is too low now, *Unrepeated Message Case*, 61 I. C. C. 541, it was reasonable in 1917. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15. *Unrepeated Message Case*, 44 I. C. C. 670. Whatever effect may be given to the judgment of the Commission in the later case, it was not intended to be retroactive. The rules prescribed by the Commission were to take effect on July 13, 1921.

We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. *Unrepeated Message Case*, 61 I. C. C. 541.

Another clause not mentioned as yet reads: "The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission." This could not be held to apply literally to a case where through the fault of the Company the plaintiff did not know of the message until the sixty days had passed. It might be held to give the measure of a reasonable time for presenting the claim after the fact was known, in the absence of anything more. But here the plaintiff called on Hackett, the General Manager at Boise, about February 14, 1918, as soon as he knew the facts. Directly after, he received a letter from Hackett regretting the occurrence and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiff returned the check by letter saying "an acceptance of this check on my part might be construed as a settlement of the matter," so that the defendant then had written notice that a claim was made. There was further communication and finally on June 18 the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause. But we are of opinion that his claim is limited to fifty dollars for the reasons given above.

*Judgment reversed.*

MR. JUSTICE McKENNA dissents.

WESTERN UNION TELEGRAPH COMPANY, v.  
CZIZEK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.

No. 300. Argued February 26, 27, 1924.—Decided March 10, 1924.

1. A contract between a telegraph company and the sender of an unrepeatd interstate message, on a form filed with and approved by the Interstate Commerce Commission, valued the message at \$50.00 in default of any higher valuation specified by the sender and paid for at a higher rate, and relieved the company of liability beyond that sum for mistakes or delays in the transmission or delivery, or for the non-delivery of the message, caused by the negligence of its servants or otherwise. *Held* valid and applicable although the message was never transmitted, due to the inadvertence of a receiving clerk in filing it in the wrong place, and to subsequent mistaken assurances that it had been sent. P. 284.
2. *Quære*: Whether this agreed limitation of liability would not have applied even if the failure to transmit had been attributable to gross negligence? P. 285.
3. The reasonableness of such a limitation is determined as of the date of the contract and not by later, prospective rules of the Interstate Commerce Commission. *Id*.
4. *Seemle*, that another printed stipulation on the telegram limiting the company's liability for nondelivery, etc., of any unrepeatd message to the amount received for sending it, was invalid in this case. *Id*.
5. A stipulation on a telegram exempting the company from liability if claim is not presented in writing within sixty days after filing of the message for transmission, *held* inapplicable where the filing of the message, by the plaintiff's agent, was unknown to the plaintiff during the sixty days, and where the plaintiff thereafter was diligent in presenting his claim. P. 286.

286 Fed. 478, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiff Czizek in an action against the Telegraph Company for damages resulting from the failure to forward and deliver a telegram.

*Mr. Francis R. Stark* and *Mr. Beverly L. Hodghead*, with whom *Mr. J. H. Richards*, *Mr. Oliver O. Haga*, *Mr. Joseph L. Egan* and *Mr. J. Julien Southerland* were on the briefs, for petitioner.

*Mr. Richard H. Johnson*, with whom *Mr. Carey H. Nixon* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit against the Telegraph Company for failure to forward and deliver to the plaintiff a message from one Jones, found by the Court below to have been acting as agent for the plaintiff in the matter. The District Court found for the defendant, but the judgment was reversed by the Circuit Court of Appeals, 272 Fed. 223, and at a second trial, in deference to the Circuit Court of Appeals, a judgment was entered for the plaintiff, which was affirmed. 286 Fed. 478. Certiorari granted. 262 U. S. 739.

The plaintiff owned fifty shares of stock in the Idaho National Bank at Boise, Idaho. Miller, vice president of the bank, was buying the stock with a view to a merger. He talked with the plaintiff and told him that he would buy his stock and that they would have no difficulty in agreeing on the price. The plaintiff told this to Jones, an attorney at Boise, who owned fifteen shares, asked Jones to act for him, saying that they would sell their stock together, and told Miller that Jones would represent him. Later Miller called on Jones and at Miller's request Jones, on November 30, 1917, wrote on a Western Union form—directing the Company to send, "subject to the terms on

back hereof", the following telegram addressed to the plaintiff at 5767 Shafter Avenue, Oakland, California, where the plaintiff lived: "Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow. Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer." The form had been filed with the Interstate Commerce Commission and the Commission had approved the provisions and rates that it set forth. Among the terms on the back of the form were the following: "To guard against mistakes or delays, the sender . . . should order it REPEATED, that is, telegraphed back to the originating office for comparison," an additional half rate being charged. "Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed . . . 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any UNREPEATED telegram, beyond the amount received for sending the same . . . 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

This telegram was an unrepeatd message of the class known as night letter, and was not specially valued or paid for upon a value in excess of \$50. It was the duty of the receiving clerk, Margaret Brown, to indorse her in-

itals, the filing time and the amount of toll received, and to place the message on the sending hook for transmission. By inadvertence, although a competent clerk, she put it in a file of earlier messages instead of upon the hook, and it was not sent. The next day Jones's son inquired at the telegraph office for an answer and being told that there was none, asked if they had sent the telegram and was answered yes. On December 3 he asked again and was told that the plaintiff had received the message. Miller was ready and willing to buy the stock until December 5, 1917, and the plaintiff testified that he would have sold if he had received the telegram. Later the stock became worthless. The District Court found that there was no gross negligence but the Circuit Court of Appeals distinguished between a failure to take the first step toward transmission and some later neglect, held that the failure was not and, as a matter of public policy, could not be within the protection of the terms that we have stated and held the company liable for \$4,500 with interest at seven per cent. from June 18, 1918, on which day the plaintiff made a demand.

The plaintiff, the respondent here, does not deny that he is bound by the terms that we have recited. That was assumed below and is established law. *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566. Those terms apply as definitely to a nondelivery in consequence of a neglect or oversight at the first office as at any other. The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the Company, but no more at the beginning than at the end, and as in fact it is that of servants, reasonable self-protection is allowed to the

master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher value on paying more for it. *Adams Express Co. v. Croninger*, 226 U. S. 491. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566, 574; *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27.

When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. *Kirsch v. Postal Telegraph Cable Co.*, 100 Kans. 250, 252. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15. With regard to the amount of the valuation, if it is too low now, *Unrepeated Message Case*, 61 I. C. C. 541, it was reasonable in 1917. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 15. *Unrepeated Message Case*, 44 I. C. C. 670. Whatever effect may be given to the judgment of the Commission in the later case, it was not intended to be retroactive. The rules prescribed by the Commission were to take effect on July 13, 1921.

We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. *Unrepeated Message Case*, 61 I. C. C. 541.

Another clause not mentioned as yet reads: "The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission." This could not be held to apply literally to a case where through the fault of the Company the plaintiff did not know of the message until the sixty days had passed. It might be held to give the measure of a reasonable time for presenting the claim after the fact was known, in the absence of anything more. But here the plaintiff called on Hackett, the General Manager at Boise, about February 14, 1918, as soon as he knew the facts. Directly after, he received a letter from Hackett regretting the occurrence and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiff returned the check by letter saying "an acceptance of this check on my part might be construed as a settlement of the matter," so that the defendant then had written notice that a claim was made. There was further communication and finally on June 18 the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause. But we are of opinion that his claim is limited to fifty dollars for the reasons given above.

*Judgment reversed.*

MR. JUSTICE MCKENNA dissents.